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A TREATISE

UPON THE

PRINCIPLES GOVERNING THE ACQUISITION AND ENFORCEMENT

OF

MECHANIC'S LIENS.

BY

S. F. KNEELAND,

Counsellor-at-Law.

SECOND EDITION.

"A painfull work it is, I'll assure you, and more than difficult; wherein what toyle hath been taken, and as no man thinketh so no man believeth, but he hath made the triall."—ANT. À WOOD—*Preface to the History of Oxford.*

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TO THE HON. SAMUEL JONES.

DEAR SIR:

I dedicate this volume to you, not in your recognized capacity as a leading member of the New York Bar, nor in your higher character as a distinguished and irreproachable jurist; but, as is more befitting, in token of that noble charity which extends to the feeblest in the professional brotherhood the encouragement and counsel of one who received its highest honors, not through political intrigue, nor by the mere accident of inherited judicial ability, nor, alone, as a graceful tribute to the memory of your honored Sire, Chancellor Jones, that grand old master in the law—at once the birth and life of our Superior Court—but, rather, as a just recognition of that ripe scholarship and personal fitness, which comes only from long years of unceasing toil.

And, sir, when the Bench shall claim its own again, I shall look with no common interest for a clear exposition, by you, of the many dark problems which have received herein the honest but, I fear, crude treatment of

Your humble servant,

THE AUTHOR.

PREFACE.

WERE Victor Hugo to write a treatise upon law, he would first divide the subject into the known and the unknown. A popular vote of the profession would not only assign the Mechanics' Lien Law to the latter class, but would condemn it to remain there. Its very name is an anomaly, and its provisions neither courts nor counsel will inquire into until a case presents itself demanding immediate action. This aversion is not without reason. Under the multitudinous local acts of this State, each different in principle and practice from the other, and all liable to be swept away as soon as partially understood—but slight incentive is held out to the student to investigate, or the jurist to establish principles as fleeting as the shadows on a hillside. But the "laborer is worthy of his reward," and the merchant of his profits. A sense of duty, therefore, requires us to assemble together, and harmonize so far as possible, and the practitioner to understand, the leading principles that underlie and govern the construction and application of all laws that may be devised to secure upon landed property, the persons contributing to its improvement.

Notwithstanding the learned and successful presentation of this subject under the New York City Act of 1863, by R. S. Guernsey, Esq., and the able treatises

of Phillips and Houck upon the general principles applicable to liens, I still hold an author's privilege to claim for his own work a special value in the particular department of law covered by it.

A preface without an apology for appearance, and a plea for mercy, is like Hamlet without a ghost. If one reads the entire book for the purpose of criticism, he will receive the greater punishment; moreover, nothing that can be inserted here will either curb a critic or make amends for that which comes hereafter. Why should an author, having done his duty as far as in him lies, attempt to extenuate faults either material in the copy or literal in the print? The first a judicious reader is able to supply; a little labor will correct the rest; he that is courteous will remit both. To create and to perfect, is to be more than man. Although text-writers can lay small claim to originality since rules of law most beneficial have already been decreed by higher powers; still, one who exposes thus his common failings to the censure of all men, should be entitled to the soothing application of that good old maxim: "*Nihil simul inventum est et perfectum.*"

S. F. K

New York, *June* 1*st*, 1875.

PREFACE

TO THE SECOND EDITION.

Although the demands of an exacting profession have interrupted the continuous study requisite in a work of this character, I trust that I have sufficiently formulated the later decisions, to give the essence of the present laws applicable to Mechanics' Liens.

In order to preserve the paging in the body of the work some of the annotations are contained in an Appendix, but so designated by sectional and page marking as to be readily applied to the text.

Parts II. and III. have been re-arranged and in part re-written. In Part II. I have presented, fully, the authorities relating to the enforcement of Liens in connection with the forms applicable thereto, and in Part III. the rules of construction given to Mechanics' Liens by our Courts and the conflicting views entertained by those of other States.

All Statutes not in force have been replaced by those enacted since the publication of the first edition.

While thanking the profession for the kind reception accorded to a first appearance, I still confess some stage fright in ringing up the curtain for the second act.

S. F. K.

New York, March, 1882.

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INTRODUCTORY.

Of Liens in General.—A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge.* As to the nature of the security, liens may be considered as either retaining or charging. A retaining lien is the right to hold possession of the property of another until the satisfaction of a debt. The charging lien is the right to charge property in another's possession with the payment of a debt or the performance of a duty. Liens have also been divided into particular and general. A particular lien is a right to charge or retain the property of another for the payment of a debt accruing on account of that specific property. A general lien is a right to retain another's property on account of a general balance due from the owner. The retaining lien is both particular and general; the charging lien is only particular. The former is passive, the latter active. The subject-matter of the former is a chose in possession, that of the latter a chose in action. As to the property charged, liens are either real or personal. The former covers real estate and is always a charging lien. The latter covers personal property and is usually a retaining lien. Liens are created either by usage, by act of law, or by act of the parties. In this country, liens by act of law arise either

* Bouvier's Law Dictionary, tit. "Lien."

under the common law or by the terms of an express statute; in the latter case they are termed Statutory Liens. Liens are also known and distinguished by the class of persons that they are intended to secure, thus we speak of the innkeeper's lien, the carrier's lien, the attorney's lien, the broker's or bailees' lien, and the mechanics' lien.

The Mechanics' Lien is a particular statutory charge upon real estate given for the security of persons improving it by their labor or materials. Mechanics have also, by common law, a particular retaining lien for their services upon personal property; and also a statutory charge, generally designated as a Maritime Lien, upon ships or vessels constructed by them; but what is generally known as "The Mechanics' Lien," only pertains to real estate. It may be considered an American System, but whether it was created by us through the necessities of a young and rapidly developing country, or whether it was borrowed from the Romans, it is difficult to decide; the former theory being more acceptable is generally adopted.

Same—Under the Civil Law.—A particular charging lien upon real estate for money expended and work performed in its improvement, existed at a very early day among the Romans. No mention of such a custom can be found in the Orations of Cicero, or in the Commentaries of Gaius; but it existed before the days of Justinian, and is set forth in the pandects or digests completed in his reign.* Domat, in his treatise

* See L. 34, D. *de reb. auct. jud. poss.*; L. 24, § 1, id.; L. 26, id.; and L. 5, D. *qui pot.*

on the Civil Law, under the title of "Privileges," says: "Architects, and other undertakers, workmen and artificers, *who bestow their labor* on buildings or other works, *and who furnish materials*, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries and for what they furnish as the seller has for the price of the thing sold.* The privilege of the seller was somewhat similar to that of our vendor's lien, which was taken from the Civil Law, and is thus stated by Domat: "He who has sold an immovable thing, for which he has not received the price, is preferred before the creditors of the purchaser, and before all others, as to the thing that is sold. For the sale implied the condition that the purchaser should not be the master of the thing till he had paid the price. Thus the seller who has not received the price, may either keep the land or tenement, if the price was to be paid before delivery, or he may follow it into what hands soever it may have passed if he has delivered it before payment."† Under the Civil Law this lien or privilege (privilegium) was extended to the person whose money has been laid out on the improvement of an estate, such as to make a plantation, or to build upon it, or to make additional apartments for the buildings already erected thereon. This principle is not yet engrafted into the American system, but it is difficult to see why money should not create the same charge upon

* Domat, Part I. Book III, Tit. 1, Sec. 5, Art. IX.

† Domat, Id., Art. IV.

land, as materials, when they are both used for the same purpose—the general improvement of the property. The nearest approach to a sub-contractor's lien under the Civil Law, is to be found in the provision extending the privilege to him who lends money to the builder. Thus, under their system, if a third person lends to an architect or other undertaker, money which is laid out on a house or any other work, and the said money has been advanced by order of the master for whom the work is to be done, this third person shall have the same privilege as if he had lent the money to the master himself for that purpose. But if the money was lent without the master's knowledge or without his order, and if the master has paid the said undertaker, he who has lent the money will have his action only against the person to whom he lent it. But if the master has not paid the undertaker, this person may use the privilege, whether he has lent the money with his master's order or without it.* Under our system the sub-contractor secures his rights either directly against the property benefited by his work, or indirectly against all the property of the owner, by a subrogation of the contractor's personal remedies upon the contract. This latter provision existed in the Civil Law, by virtue of what is termed by Domat as a "substitution by an attachment;" thus, where the contractor has a privilege or lien against the property, and a claim against the owner for the work done, or materials furnished thereon, the creditor or sub-contractor may, by an order from the Judge, attach his rights and actions

* Domat, Id., Art. X.

against the owner, procuring what he has attached to be adjudged to him; and he is thereby substituted to the privileges which his debtor had for the debts attached;* or, as the Pandects have it, "the debt which is attached is adjudged to the attaching creditor, such as it belonged to the debtor."†

Modern Civil Law States.—With the exception of England, all countries adopting the Civil Law have also adopted its peculiar provisions in reference to the privilege of mechanics and others upon real estate. Thus, in France, architects, contractors, masons, and others employed in building, re-building, or repairing houses, canals, or any other works whatever, have a privilege similar to that under the Civil Law, provided that an estimate has been previously executed by a competent person, nominated officially by the Court within whose jurisdiction the buildings are situated, for the purpose of verifying the state of the places in relation to the works which the proprietor shall declare he has an intention to form, and also that such works have been, within six months from their completion, admitted by a competent person likewise officially nominated.‡ But the amount of the privilege could not exceed the value set forth in the second statement; and in case of a sale, either judicial or voluntary, of the property charged therewith, it only extended as against the vendor's lien, to the increased value the improvements gave to the property at the

* See Strahan's Domat on Civil Law, Paragraph 1786.

† L. 1, C. de præt, *pign.*

‡ Code Napoleon, Art. 2110.

time of the sale.* The French Code, like that of Justinian, extends the privilege to those who have loaned money to pay or reimburse the workmen, provided such employment be authentically verified by the act of loan, and by the acquittance of the workmen that such payment was made or loaned for that purpose.† A similar provision is engrafted into the Civil Codes of Lower Canada‡ and Sardinia.§ And a security is also provided for persons furnishing money and materials, and performing labor upon the building or repair of houses, under the Civil Code of Louisiana,‖ and under the laws of Mexico and Spain.¶

The American System.—The mechanics' lien upon real estate, under the American system, is entirely statutory. The common law idea of a lien was a right to the actual possession of property until some debt connected with it was fully satisfied. To this day, England is without any provision for the protection of persons improving real estate by the erection or repair of buildings thereon. But in a country where improvements are gradual, and real estate is held by a wealthy and conservative class, no real demand arises for such a law.

Our first attempt to charge the lien of a mechanic upon real estate, arose from a desire to establish and

* Merlin Répertoire, Privilege de Creance, Sec. 2.

† Code Napoleon, Art. 2103.

‡ Art. 2013.

§ Code Civil du Royaume de Sardaigne, par Foucher, Art. 2158.

‖ Articles 2743–4–5.

¶ See Civil Law of Spain and Mexico, by G. Schmidt, 301 ; Partidas, L. 28 ; Tit. 13, p. 5.

improve with all possible speed the City of Washington, upon its adoption as the permanent seat of government.* In 1791, Commissioners appointed for that purpose, reported to the General Assembly of Maryland, in favor of a lien for mechanics and others upon buildings, for the reason that it "would encourage master-builders to contract for the erecting and furnishing houses for certain prices agreed on, if a lien was created by law for their just claim on the house erected, and the lot of ground on which it stood." In pursuance with this memorial, such a law was adopted in December of the same year.† When we consider that the original memorial, and doubtless the law itself, was prepared by such statesmen as Madison and Jefferson, it may well be imagined that both the wise provisions of the Civil Law, and the familiar and well-understood doctrine of the artificer's lien on chattels under the common law, entered into the formation of the new system. This American remedy, though limited and imperfect at first, and confined in its operation to a few of the leading cities, has by degrees, as its necessity and justice became apparent, gradually grown in importance and developed in nature until it now has become the settled policy of every State.

New York State has never had a complete system applicable to the entire State. The City of New York has always enjoyed a law distinct and peculiar to herself, and most of the other large cities have at times claimed similar rights. Thus, the City of Buffalo; the

* See Phillips on Liens, p. 11.

† Md. Act of 1791, Chap. 45.

counties of Kings and Queens, containing the City of Brooklyn and the suburban cities of New York; Onondaga County, containing the enterprising city of Syracuse; Rensselaer County, with its ambitious Trojan City, have each separate acts. The rest of the State is covered by one general law, which will be known in this treatise under the title of "The State Act," the other statutes being designated by their territorial jurisdiction, as, "The Onondaga Act," "The Buffalo Act," "The Kings and Queens Act," etc.

General Arrangement. — Part I. will contain the general provisions of law applicable to all liens. In Part II. we shall consider separately the several acts, with the practice and forms peculiar to each. Part III. is devoted entirely to the Mechanics' Lien Statutes, past and present, in this State; and is mainly beneficial in applying the decisions rendered under former acts to the provisions of the existing statutes.

In the treatment of the principles applicable to liens in general, and also where the statutory provisions under which given decisions are rendered, are similar to each other or to those of this State, the provisions of the statute are not given with the decisions of the courts; but where a question of statutory construction is considered, the terms of the particular statute receiving a given construction are quoted, with the decisions applicable thereto. I have also deemed it advisable, from the special nature of the subject herein presented, and from the extended range of illustrative decisions, to state principles of law in the

exact language of the courts, so that a full reading of the case will not be necessary for the practitioner to ascertain how far they will effect analogous questions that may arise in the practice of Mechanics' Liens.

PARTIES TO THE LIEN.

CHAPTER I.

THE CLAIMANT.

§ 1. In General.—The parties to a Mechanic's Lien consist of the claimant, or lienor, and the owner. The claimant is the person for whose benefit, and the owner the person against whom, the lien is filed. In respect to the capacity in which he acts, and the relation borne to the owner, the claimant is usually termed a contractor, sub-contractor, laborer, or material-man. The contractor is the person who makes a contract with the owner.* The sub-contractor is one who has entered into a contract with the contractor, or with some other person who has contracted for the performance of the specified act. The sub-contractor in a certain strict sense is always a contractor, and the courts have held under the lien acts that the term "contractor" includes a sub-contractor.† But, as generally understood and accepted, the latter term is used to designate one who contracts with some person other than the owner. The term "laborer" is used to designate one who performs work, and "material-man" one who furnishes

* Simpson *v.* Dalrymple, 11 Cush. (Mass.), 308.

† Peters *v.* St. Louis & Iron Mt. R. R., 24 Mo., 586; Kent *v.* New York Central R. R. Co., 12 N. Y., 628.

materials for the owner, contractor, or sub-contractor. If the labor is performed or material furnished for the owner direct, they rank in law as contractors; if for any other person lawfully contracting for the same, they are, strictly, sub-contractors. Section 14 of the New York City Act of 1875, expressly says that "*All persons* entitled to liens on the structure or improvement, except those who contracted with the owner thereof, shall be deemed sub-contractors." As regards the legal rights of the parties it may be said, therefore, that the claimant must be either a contractor or a sub-contractor.

§ 2. **"Any Person."**—The several Mechanics' Lien Acts of this State unite in making the privilege of a lien as broad as language can frame it. "Every person" says the New York City Act, "Any person," say the other acts, who performs labor or furnishes materials by the "request" [N. Y. City Act], "consent" [State Act], or "permission" [Kings Co. Act], of the owner, may have a lien. Construing this language strictly, there is no limit to the right so far as parties are concerned. Unfortunately for this simple construction, the term "any person" is not always construed literally.* It only covers those persons whom it is reasonable to presume the Legislature intended to be designated, and who are capable, legally and physically, of coming within its terms. Thus, the statute giving a married woman the right to prosecute for slander "any person" who shall defame her character for chastity, does not authorize her to entertain

* Freethy *v.* Freethy, 42 Barb., 641.

an action of that nature against her husband.* This principle is stated in numerous English and American decisions.† But it points out only the exceptions to the rule, and it may be stated literally that any person who can place himself within the provisions of the statute may secure the benefit of it. The exceptional cases pertain only to those acting under a legal disability or in a representative capacity.

§ 3. **The Contractor.**—Although the original contractor may sub-let his entire contract, and neither "perform labor" or "furnish materials," in a literal sense, yet he will still be entitled to a lien; for each sub-contractor is an agent for the performance of a portion of the entire contract, and the act of an agent is in law the act of his principal. Moreover, the Legislature could not have intended that one must perform the entire work with his own hands to entitle him to the benefit of the act. It is noticeable, however, that the word "contractor," contained in the 1st Section of the act of 1863, is omitted in the corresponding section of the act of 1875, for New York City. The Supreme Court of the United States, under a provision in the Act of Congress similar in effect to that contained in the act of 1875, and in most of the other acts now in force, denied the right of lien to the contractor, on the ground that he had an opportunity by his contract with the owner to provide his own security, and that the act only applied to the mechanics

* Freethy *v.* Freethy, 42 Barb., 641.

† Stowell *v.* Lord Zouch, Plowd., 365; Reniger *v.* Fogassa, Id. 13; Partridge *v.* Straunge, Id. 88; People *v.* Butler, 3 Cow., 347; Smith *v.* Smith, 15 How. Pr., 165.

and tradesmen whose personal labor or property is incorporated into the building.* But as other portions of the several acts in this State expressly provide for the lien of the contractor, there is no doubt of his right to acquire it, except where he forfeits his privilege by his own acts.

§ 4. **Sub-Contractors, Laborers, and Material Men** are specially provided for by all the existing statutes in this State, and it makes no difference in what degree they stand to the original contractor, provided the work or material was rendered specially for the building on which the lien is sought.† But where work is done or materials furnished for a sub-contractor, a lien cannot be acquired without there is money due to him and to all the persons standing between him and the owner.‡ Neither the owner, the contractor, nor any sub-contractor, can be compelled by such proceedings to pay any third party a greater sum than that due to the person with whom he has contracted.

§ 5. **General Employment.**—It is essential that the work or materials should have been rendered especially for the particular buildings on which the lien is sought. Thus, a journeyman or laborer employed by the month or year for the performance of work generally, is not entitled to a lien on the building he happens to have been engaged upon at the time of a default in the

* Winder *v.* Caldwell, 14 How. U. S., 434. See also to the same effect, Jones *v.* Shawhan, 4 Watts' & S. (Pa.), 257.

† Clark *v.* Kingsley, 8 Allen, Mass., 543; Lumbard *v.* Syracuse R. R. Co., 64 Barb., 609; Id. on appeal, 55 N. Y., 491; Barker *v.* Buell, 35 Ind., 297.

‡ Lumbard *v.* Syracuse R. R. Co., 55 N. Y., 491.

regular payment. And the mere sale of building materials in the ordinary course of trade, and without reference to any particular building, does not give the merchant a right of lien upon the property actually benefited thereby.† The materials should be furnished *for* as well as applied *upon* some specific property, to entitle the tradesman to a lien.‡

§ 6. **Agents.**—A person who furnishes materials as an agent, cannot acquire a lien therefor, even though he should afterwards become personally liable for the payment of such materials. He may, however, file the lien in such a case in the name of his principal, and afterwards take an assignment of it.§ Nor is the agent of the owner entitled to a lien for materials procured by him in that capacity, although he afterwards pays for the same personally.‖

§ 7. **Assignees.**—The right to acquire a lien is a personal one, and cannot be transferred to another. It is given for the personal protection of the one who performs the work or furnishes the materials.¶ An assignee is not, therefore, entitled to file a lien for

* Fox *v.* Rucker, 30 Geo., 525; Choteau *v.* Thompson, 2 Ohio, 114.

† Coates *v.* Shorey, 8 Iowa, 416.

‡ Chapin *v.* P. & B. Paper Works, 30 Conn., 461; Hunter *v.* Blanchard, 18 Ill., 318; Bennett *v.* Shackford, 11 Allen (Mass.), 445; Horton *v.* Carlisle, 2 Disney (Ohio), 184; Choteau *v.* Thompson, 2 Ohio, 114; Hill *v.* Bishop, 25 Ill., 349.

§ Rollins *v.* Cross, 45 N. Y., 766.

‖ Kerby *v.* Daly, Id., 84.

¶ Caldwell *v.* Lawrence, 10 Wis., 332; Pearsons *v.* Tincker, 36 Me., 384; Rollins *v.* Cross, 45 N. Y., 766; Roberts *v.* Fowler, 3 E. D. Smith, 632.

work done before the assignment.* There is no reason or equity in this discrimination against assignees, and it is not followed in many of the States.† There is a well-grounded equity rule founded in the Roman Law, that the assignee of a debt secures all the privileges and securities possessed by the original creditor.‡ Under the New York Code,§ an assignment of a debt transfers the entire cause of action *and all the remedies incident thereto.* It is difficult to see why this will not operate to give the assignee the same right to file a lien, possessed by the assignor. In Maryland the courts hold that where the statute is silent on the subject, the contract and right of lien may be assigned, the same as any other *chose in action*, the assignee taking subject to the equities of the original parties.‖ In this State the Court of Common Pleas, at General Term, held that the right to file a lien passes by assignment to the remaining partners of a firm on dissolution.¶ This decision was overruled by the Court of Appeals on a question of fact in the case, without passing upon the legal questions involved therein; the court holding that the partners did not *assign* their claims, but *released* them, leaving the claimant the sole owner.** The rule adopted by the Common Pleas

* Id.; Fitzgerald *v.* First Presbyterian Church. 1 Mich. (N. P.), 243.

† See Tuttle *v.* Howe. 14 Minn., 145; Iaege *v.* Bossieux, 15 Grattan (Va.), 83.

‡ The Hull of a New Ship, Davies. 199.

§ Section 427.

‖ Crawford *v.* Severson, 5 Gill. (Md.), 443.

¶ Hubbel *v.* Schreyer, 14 Abb. Pr. (N. S.), 284.

** See Mem., 56 N. Y., 604.

is practically similar to that in Westervelt *v.* Levy, and followed in Massachusetts in the case of Bushfield *v.* Wheeler.*

§ 8. **The Same—May file in the name of Assignor.**—After the lien has been filed by the original creditor, it becomes a specific interest in real estate, and may be assigned the same as a mortgage; the assignee being subrogated to all the rights of the assignor. And if the lien is not previously filed, the assignee secures the same privilege by filing it in the name of the assignor, and he may afterwards foreclose it, either in his own name as assignee, or in the name of the assignor.† The same rule applies where the assignment is made for the benefit of the assignor, and to be upheld as his agent.‡

§ 9. **Loan or Advancement of Money.**—The same principle which prevents an agent or assignee from filing a lien in his own name, acts to debar one who loans money to the claimant on account of the claim, or pays for the contractor the amount due by him to laborers and material men, or who, at the request of the debtor, advances money to pay a third person his claim for services, from acquiring a lien in his own name for a reimbursement.§

§ 10. **Personal Representatives.**—It was formerly considered that the right to acquire a lien was so far a personal privilege as to die with the person, and that

* 14 Allen (Mass.), 139.

† Hallahan *v.* Herbert, 11 Abb. Pr. (N. S.), 326; Palmer *v.* Merrill, 6 Cush. (Mass.), 282.

‡ Rollins *v.* Cross, 45 N. Y., 766.

§ Pearsons *v.* Tincker, 36 Me., 384. The rule was different under the Civil Law; See *Infra* p. 9.

it could not be enforced by the personal representatives without it was previously filed by the decedent.* The later and better opinion seems to be that if the right accrued during the life of the decedent it may be perfected after his death by his executors or administrators,† provided the claim is filed within the time required by the statute. The death of the contractor will not prevent sub-contractors from enforcing their rights, provided the contract is completed by his personal representatives or by such sub-contractors.‡ And where the foreclosure suit is pending at the time of the death of the claimant, the Court, having jurisdiction over the original parties, may order a substitution, as in ordinary actions where there has been a change of interest.§

§ 11. Owners—Joint Tenants—Tenants in Common.—We have seen that there must be two parties to every lien—the owner and the contractor—it follows that the owner and the contractor cannot be one and the same person. An owner cannot, therefore, enforce a lien on his own building to the prejudice of other encumbrancers. Moreover, should such a lien be created, it would merge in the superior title of ownership. The members of a voluntary unincorporated association are considered as copartners and joint owners of property: they cannot, therefore, secure a lien thereon to the prejudice of other creditors.‖ But where the

* Nott's Lien Law, page 87.

† See Tuttle *v.* Howe, 14 Minn., 145; and Telfer *v.* Kierstead, 9 Abb., 418.

‡ Telfer *v.* Kierstead, 9 Abb., 418.

§ See Section 121, Code of Procedure.

‖ Babb *v.* Reed, 5 Rawle (Pa.), 151.

title to the property in such a case is in the name of trustees, there can be no merger; and a member of the association may contract with such trustees as owners, and acquire a valid lien.* A husband cannot acquire a lien by building with common funds a house on the separate property of the wife.† But a tenant in common, being seized *per mie* but not *per tout*, may, for work done at the request of his co-tenants, acquire a lien on their undivided shares in the common property.

§ 12. **Corporations.**—It is a well-established rule of statutory construction, both in this country and England, that corporations are to be deemed and considered as persons, where the circumstances in which they are placed are identical with those of natural persons especially included in a statute.‡ Corporations, in furnishing materials to a contractor for the erection of a building, are certainly placed in the same position as a mercantile partnership or a single individual acting in the same capacity. It follows, therefore, that the term "any person" includes any corporation having the power to furnish materials and to maintain an action thereon; and the courts have often recognized this view of the case.§ But a municipal corporation cannot acquire a lien without special authority by statute.‖

* Young *v.* Lyman, 9 Penn. (Barr.), 449.

† Peck *v.* Brummagin, 31 Cal., 440.

‡ See South Carolina R. R. Co. *v.* McDonald, 5 Ga., 531, and cases cited.

§ See Dalles L. & M. Co. *v.* Wasco Woolen Mills Co., 3 Oregon, 527.

‖ Yates *v.* Borough of Meadville, 56 Pa., 21; Borough of Mauch Chunk *v.* Shortz, 61 Id., 399.

§ 13. **Minors, Married Women, etc.**—Where the right of lien depends upon the existence of a valid contract, the claimant must be capable of contracting. A minor, though he may not be himself bound, may bind others by his contracts, and the owner having received the benefit of his labor or materials, cannot interpose the defense of infancy to a lien filed by him. This defense is personal to the minor.* In such a case the lien may be filed in the name of the infant, and foreclosed through a guardian. Since the adoption of the Enabling Act in this State, a married woman may acquire a lien in her own name for contracts entered into, materials furnished, or work done by her or her agents. Whenever she acts in a separate capacity, or deals with her separate property, she acquires all the rights of a *feme sole*.

§ 13*a*. **Architects and Superintendents.** — The architect who makes the plans and superintends the construction of a building, performs labor as truly as the carpenter who frames it and the mason who lays the brick. It is none the less labor because it is performed by a skilled artisan. The lien being given to all persons performing labor and not to a particular class, the architect is entitled to its benefits.

* Stephenson *v.* Stonehill, 5 Wheaton, U. S., 706; Van Bramer *v.* Cooper, 2 Johns., 279; Whitmarsh *v.* Hall, 3 Denio, 375; Gates *v.* Davenport, 29 Barb., 160.

PARTIES TO THE LIEN.

CHAPTER II.

THE OWNER.

§ 14. In General.—To charge a person as owner under the Mechanics' Lien Acts of this State, two elements must always exist: First, he must have an interest capable of sale under execution* in the lands or improvements sought to be charged. Second, he must have contracted for the performance of the work.† In other words he must not only be an owner, but must hold himself out as owner.‡ We shall first treat of the interest in the property requisite to create the statutory relationship of "owner," and then of the contract by such owner.

§ 15. The Extent of Title.—The State Act, as amended in 1873, specifies fully the interest necessary to create the charge. It gives the lien "to the extent of the right, title, and interest of the owner of the property, whether owner in fee or of a less estate, or whether a lessee for a term of years thereafter, or vendee in possession under a contract existing at the time of the filing of said notice, or any right, title or

* See Grant *v.* Vandercook, 57 Barb., 165.
† Muldoon *v.* Pitt, 54 N. Y., 269.
‡ Ombony *v.* Jones, 19 N. Y., 234.

interest in real estate, against which an execution at law may now be issued, under the general provisions of the statutes in force in this State relating to liens of judgment and enforcement thereof."* This definition of an owner embodies the gist of all the decisions in this State, under the questions arising upon a construction of the several acts, and may be cited as a clear exposition of the law at the present time under every Mechanics' Lien Statute in this State. The test question in each case is: Has the person for whom the contractor performed the work an interest in the lot or buildings benefited by it, capable of sale under execution? For it is evident, since the lien must be enforced by virtue of a sale either under execution or a decree of foreclosure, that the "owner" must have a salable interest in the property charged. This principle being established, it is easy to apply the familiar rules governing the sales of real estate under an ordinary judgment and execution. But there are some peculiarities growing out of the combined relationship of owner and contractor, in lien cases, that will make it necessary for us to investigate the many decisions peculiarly applicable to Mechanics' Liens.

§ 16. **Legal Title.**—A party may be charged as owner who holds the title to premises, although the grantor has a vendor's lien upon the same for the entire purchase-money,† and it may be stated as a general rule that legal title to premises, united with the possession, constitutes an ownership within the statute. Thus,

* Laws of 1875, Chap. 233. See Part III, Statutes.

† Nazareth Lit. & B. Inst. *v.* Lowe, 1 Ky., 258.

where a woman holding a deed to property, erects buildings thereon as owner, the land is chargeable with the liens of the mechanics employed by her, although the consideration for the purchase of the property was paid out of trust funds.*

§ 17. Agreement of Sale—Building Contracts.—It is a matter of common occurrence, especially in the cities of New York and Brooklyn, that a capitalist, in order to dispose of vacant lots, enters into a written agreement with a builder, whereby he agrees to sell them to him at a certain price within a specified time, and in the meantime loans him money to aid in the erection of buildings thereon. Such agreements are generally termed "building contracts;" the capitalist being known as the vendor, and the builder the vendee. In the absence of an express statute to the contrary, sub-contractors and others, who have performed labor or furnished materials under a contract with the vendee, must look to him and his interest in the property alone for payment. They cannot charge the vendor as "owner,"† even though the agreement of sale is in parol, and void under the statute of frauds.‡ The Court of Appeals has recently held that a lien filed against one who at the commencement of the work held a contract to purchase which was afterwards per-

* Anderson *v.* Dillaye, 47 N. Y., 678; Peabody *v.* East Met S., 5 Allen (Mass.), 540.

† Gay *v.* Brown, 1 E. D. Smith, 725; Miller *v.* Clark, 2 Id., 543; Loonie *v.* Hogan, 9 N. Y., 435; Hallahan *v.* Herbert, 11 Abb. N. S., 326.

‡ Walker *v.* Paine, 2 E. D. S., 662; *sed contra*, Gray *v.* Carleton, 35 Me., 481.

fected by obtaining the legal title, covers all the time of performance, and charges the fee subsequently acquired.* But the courts in this country are not unanimous on the question of ownership in such a case, necessary to charge property with a mechanic's lien. While New York† and Iowa‡ hold that possession under a contract of purchase is sufficient, the converse rule is held in Maine§ and Massachusetts.‖ But when the agreement of sale or building contract contains a clause to the effect that if there is any failure on the part of the vendee to fulfil his part of the agreement, his entire interest in the premises shall cease, the vendee has not an interest sufficient to charge the estate as owner, in the erection of the buildings provided for in the agreement of sale, without he, or some one in his behalf, fully completes the contract.¶

§ 18. Same—Effect of the Rule—Statutory Provisions.—The application of the rule adopted by the courts in reference to vendors, often creates great hardship to the mechanic, since the failure of the vendee contracting for the labor, to fulfil his contract with the vendor, forfeits the land with all its improvements to the latter who takes the benefit of the increased value without the corresponding liability to the mechanics and material men for its payment. To

* McGraw *v.* Godfrey, 56 N. Y., 610.

† Belmont *v.* Smith, 1 Duer, 675, and cases cited *supra.*

‡ Monroe *v.* West, 12 Iowa, 119; Stockwell *v.* Carpenter, 27 id., 119.

§ Johnson *v.* Pike, 35 Me,. 291; Gray *v.* Carleton, id., 481.

‖ Thaxter *v.* Williams, 14 Pick., 49.

¶ Randolph *v.* Garvey, 10 Abb. Pr., 179; (S. C.) 19 How. Pr., 505.

remedy this evil, a Section was incorporated into the New York City Act of 1863, to the effect that the vendor, in the agreement of sale with a building contract, shall be deemed the "owner," and the vendee the "contractor" for the erection of the buildings thereon. Thus charging the work directly upon the property benefited by it. This Section, however, was omitted in the act of 1875, and no such provision exists in the State Act. But Section one of the present act for Kings and Queens County, provides that: "In cases in which the owner has made an agreement "to sell and convey the premises to the contractor or "other person, such owner shall be deemed to be the "owner within the meaning and intent of this act, "until a deed shall have been actually delivered, so as "to pass the fee simple of said premises." This provision fully protects sub-contractors, mechanics, and material men; since the building contract connected with the agreement of sale, answers to the original contract with the owner in ordinary cases.

§ 19. **Same—Consent of Party Charged.**—But even under this provision, the lien cannot be charged against the vendor as owner when the work is performed under a contract with the vendee, unless the building is constructed by the permission or consent of the vendor.* This provision of the statute is designed to charge the land with debts contracted in improving it with the owner's consent, although the contract be made with the vendee.† Where the sale is consummated before the filing of the lien, and both the legal

* Knapp *v.* Brown, 45 N. Y., 766.

† Id.

and equitable title is in the vendee, this provision of the statute will not apply, and the lien may be filed against the vendee as owner. The latter having contracted for the work to be done, unites both requisites of ownership. And where the contract for labor or materials in such a case is made by the vendor instead of the vendee, and the building contract is consummated by a transfer of the fee to the vendee before the filing of a lien, the claimant may file it against the vendee, as his permission will by virtue of the contract be presumed, and the vendor be deemed to have acted as his agent. Under such circumstances, the conveyance to the vendee would, in legal analogy, relate back to the time when the agreement of sale or building contract was executed.*

§ 20. **Equitable Ownership—Mortgagor and Mortgagee.**—The word "owner" includes owner in equity as well as at law.† One having an equitable interest in lands, has an estate generally sufficient to be chargeable with a lien‡ Thus the owner of the equity of redemption may, during his possession of the mortgaged property, be deemed the "owner" within the meaning of the statute.§ And a conveyance of the premises by the owner and builder, made before the

* Knapp *v.* Brown, 45 N. Y., 207.

† Rollins *v.* Cross, 45 N. Y., 768; Atkins *v.* Little, 17 Minn., 353.

‡ McAuley *v.* Mildrum, 1 Daly, 396; Belmont *v.* Smith, 1 Duer, 675; Keller *v.* Denmead, 68 Pa., 449; Crowell *v.* Gilmore, 13 Cal., 54; Harsh *v.* Morgan, 1 Kansas, 293; Brown *v.* Morrison, 5 Ark., 217.

§ Reid *v.* Bank of Tennessee, 1 Sneed (Tenn.), 262; Otley *v.* Haviland, 36 Miss., 19.

claimant files his lien, but which, by an instrument executed subsequent thereto, is shown to have been intended only as a mortgage, does not prevent the lien from attaching upon the equitable interest of the vendor at the date of such filing;* and where the conveyance is made, pending the erection of a building as security for a debt, and subsequent to the filing of the claim, such debt is discharged, and the property reconveyed, the lien will be valid and binding upon the property as of the date of the filing of the same.†

§ 21. **Same—Estate of Mortgagee.**—But the mortgagee having a mere naked legal title without possession, acquires in equity only a contingent right *to* and not *in* the property, in the nature of a chattel interest, as the security for a debt. The statute never designed such an interest to be reached by a mechanic's lien. Under ordinary circumstances, a mortgagee is not an "owner" within the statute.‡ For the same reason, one holding temporarily the legal title by deed, as security for monies advanced for the erection of a building thereon, for the benefit of the equitable owner, cannot be held liable, as owner, in a lien proceeding instituted by a sub-contractor.§ But the rule is different where the mortgagee is in possession. His chattel interest, by occupancy, ripens into a conditional fee. He is an owner of the mortgaged premises, subject, nevertheless, to the right of the mortgagor to redeem

* McAuley *v.* Mildrum, 1 Daly, 396.
† Gordon *v.* Torrey, 2 McCarter, Ch. (N. J.), 112.
‡ Cox *v.* Broderick, 4 E. D. Smith, 721.
§ Id.

by payment of the mortgage. Under such circumstances, he is an "owner" within the statute, as to all contracts made by him in his own right,* and also as to contracts entered into by the mortgagor as agent of the mortgagee.† The mortgagor will not be liable as owner for improvements made without his consent, by the mortgagee in possession.‡ But he is chargeable if the mortgagee acted as his agent, and a presumptive agency is created where the work done or materials furnished were for necessary repairs.§

§ 22. **The Same—Parol Partition.**—The Supreme Court, in the case of Otis *v.* Cusack,‖ held that where the title to vacant lots was vested in one of two persons who verbally agreed upon a partition with the other, who thereupon took separate possession of the portion allotted to him, and erected a building thereon —the interest of the latter is sufficient to make him chargeable as owner, and the lots set off to him the subject of a mechanic's lien, notwithstanding the fact that the entire legal title was in his co-tenant. The rule that a parol partition between tenants in common, accompanied by separate possession, binds the parties, and all those claiming under them, is applicable in such a case.

§ 23. **Joint Tenants and Tenants in Common.**—Joint tenants are seized *per mie et per tout* of all the joint property; a tenant in common is seized *per mie*, it is

* Ombony *v.* Jones, 19 N. Y., 234.

† Pride *v.* Viles, 3 Sneed (Tenn.), 125.

‡ Quinn *v.* Brittain, 1 Hoff., 353.

§ Id.; Story's Eq. Jurisp., § 1237, 1238; Guernsey's Lien Law, Sec. 114.

‖ 43 Barb., 546.

evident, therefore, that one who owns either a joint or several interest in real estate is an "owner," so far as his separate interest is concerned, and he may create a lien thereon in favor of a mechanic;* but a co-tenant in common, who is not a party to the arrangement and whose separate share is not benefited by it, cannot be made a party to the lien. The rights of one tenant in common to charge the entire property with a lien on account of repairs or improvements, are more difficult to fix and determine. Undoubtedly, if the work benefits the entire property, and it is ordered by one *at the request* of his co-tenants, they can all be united as owners, since as to the others he acts as an agent, and they are bound as fully as if each personally ordered the work. But how is it when the authority is a mere license or permission to make the necessary outlay? This depends upon the nature of the work; he may cause *necessary repairs* to be done at the expense of the entire property, even against the wish of the others; but as to erections or improvements, all the co-tenants must consent that the work shall be performed, or their joint or common shares will not be chargeable therefor.†

§ **24. Dower.**—An inchoate right of dower, or a tenancy by curtesy initiate, will not constitute an ownership within the meaning of the lien act. But when dower has been assigned,‡ and doubtless after the

* Hillburn *v.* O'Barr, 19 Geo., 591; Van Court *v.* Bushnell, 21 Ill., 624; Roach *v.* Chapin, 27 id., 196; Keller *v.* Denmead, 68 Penn., 449.

† Taylor *v.* Baldwin, 10 Barb., 626, and cases cited.

‡ Ermul *v.* Kullok, 3 Kansas, 500.

death of the husband, the widow may charge her separate interest by improvements or alterations ordered by her. If she cannot subject her inchoate right of dower, during the life of the husband, to a mechanic's lien, it follows *a fortiori* that it will not be charged by a lien for materials furnished under a contract with the husband, although it increases the value of her contingent dower interest. Nothing but a release in due form, made by the wife personally, will affect her rights in this respect.* The reason for this rule is well expressed in the case of Bishop *v.* Boyle,† to the effect that where there are two inconsistent statutes, the one giving the wife dower in all her husband's real estate, the other giving a mechanic a lien in the same property to the extent of the work done thereon, the difficulty must be solved by the application of general principles. A house erected on the lands of the owner is real estate. The wife's dower is a favorite of the law, not resting on contract, but resulting from the marriage relation. Hers is the elder lien. But if the lien of the mechanic be first perfected, either by attaching itself to the premises prior to marriage,‡ or to the purchase of the property,§ it takes precedence of the right of dower, since dower can only attach to the interest of the husband in the property charged thereby.

* Shaeffer *v.* Weed, 3 Gilman, Ill., 511; Gove *v.* Cather, 23 Ill., 634; Vanbrouker *v.* Eastern, 7 Metcalf, (Mass.), 162.

† 9 Ind., 169.

‡ Pifer *v.* Ward, 8 Blackford, (Ind.), 252.

§ Nazareth L. and B. Institute *v.* Lowe, 1 Ky. (B. Monroe), 258.

§ 25. **Estate by Curtesy—Marital Rights.**—Although the husband cannot charge the wife's interest in lands with a mechanics' lien, yet he may, under his common law rights, charge his own interest therein during the life of the wife,* and his right by the curtesy after her death,† and when the common law joint life estate is enlarged to an estate by curtesy after the contract is made, the lien will extend to such increased interest of the husband.‡

§ 26. **Guardians, Trustees, Executors** and others acting in a representative capacity, can only charge property with a lien when the legal title is vested in them. The person contracting for labor or materials should have a tangible personal interest in the premises to be benefited therewith. Without a guardian is specially empowered to encumber the lands of his ward, no lien can be acquired for materials furnished to him in that capacity; § nor will the general authority by statute "to keep up and sustain the houses, grounds, and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other monies of the ward in his hands," justify a guardian in rebuilding an entire structure that has been destroyed by fire, so as to bind himself or his ward by a mechanic's lien for work performed thereon;‖ nor will a special authority from the court "to erect out

* Butler *v.* Rivers, 4 R. I., 38; McCarty *v.* Carter, 49 Ill., 53.

† Fitch *v.* Baker, 23 Conn., 563; Hays *v.* Hogan, 5 Cal., 240.

‡ Kirby *v.* Tead, 13 Met., 149.

§ Grant *v.* Vandercook, 7 Barb., 165; Christian *v.* Thompson, 2 Ohio St., 114.

‖ Copley *v.* O'Neil, 57 Barb., 299.

of the funds of his wards, a building upon their lot, of such dimensions and quality as may suit their interest," justify the erection of a building on credit and thereby destroy the interest of his wards.* A trustee of an express trust, having no power over property save that conferred by statute or the courts, a person contracting with him must, to protect himself, inquire into the extent of such authority, for if he relies upon a contract which has no validity, even equity cannot give him relief however meritorious his claim may be.† But a guardian, executor, or trustee of an express trust, having title to premises may, for necessary repairs, or for such erections, alterations, or improvements as come within their power to construct on credit, subject the estate to a mechanic's lien ; ‡ and the building may be bound by the lien, even though the estate is not charged thereby, and cannot in the lien proceedings be held for the amount of the indebtedness thus accruing.§

§ 27. **The Estate of a Decedent.**—We have in the previous Section only treated of executors as "owners," and of their power to charge the trust estate by acts of their own, after it has come into their possession. If the land is not charged with a mechanics' lien, prior to the death of the owner, it cannot be charged there-

* Payne *v.* Stone, 7 Smedes and Marshall, 367.

† Guy *v.* De Uprey, 16 Cal., 196; but see *dicta* of the court in Copley *v.* O'Neil, 57 Barb., 299; and in Miller *v.* Hollingsworth, 33 Iowa, 224.

‡ Crystal *v.* Flannelly, 2 E. D. Smith, 583; Anderson *v.* Dillaye, 47 N. Y., 678.

§ Weathersby *v.* Sinclair, 43 Miss., 189.

after;* but where the lien is filed during his life the property passes by devise or descent, subject to all the rights of the original parties, and may be enforced against them the same as against subsequent grantees.

§ 28. **Personal Disabilities—Minors, etc.**—A mechanics' lien being founded upon the existence of a valid contract with the owner, it necessarily follows that where the owner is legally incapable of being bound by his contracts—as in the case of infancy, or lunacy, or a *feme sole* under the common law, no lien can be acquired.† Under such circumstances the builder takes the responsibility of ascertaining whether he is dealing with a person competent to contract.‡ Although the lien law fails in a case where the guardian of an infant daughter, without competent authority erects a house on the land of an infant ward;§ or in the case of a building erected for a married woman, shielded by her common law privileges,‖ it does not prevent the builder from securing a remedy in a court of chancery. It is an equitable charge upon the land of which an equity court will take cognizance.

§ 29. **The Same—Ratification.**—What will amount to a ratification sufficient to charge the infant's estate, is a question that may be answered by the application of the ordinary rules governing the ratification of any contract by an infant on attaining his majority. There being no saving clause in the statute, infancy will not

* Crystal *v.* Flannelly, 2 E. D. Smith, 583.

† Johnson *v.* Parker, 3 Dutch., (N. J.), 242.

‡ McCarty *v.* Carter, 49 Ill., 53.

§ Copley *v.* O'Neil, 57 Barb., 299.

‖ Miller *v.* Hollingsworth, 33 Iowa, 224.

suspend the time for filing or enforcing the lien, and the ratification must be done, if at all, before the expiration of the time prescribed by the statute. The original contract subsequently ratified being valid, the claimant may secure a valid lien if it is perfected within the statutory limitation.

§ 30. **The Same—Must be Voluntary.**—Ratification is a question of intention, and can only be inferred from the free and voluntary acts or words of the adult. The mere receipt of rents does not amount to such a ratification as would operate to create upon the building a mechanics' lien, as the law will not compel a minor to choose between the utter abandonment of his property, and the creation of a lien upon it, under a contract made during his minority; and to say if he retains the property, he ratifies the lien. Such a construction of the law would nullify that protection it designs to bestow, for the builder might safely assume that the minor would continue in possession of his own property, and thus by the ratification create a lien which the statute had not given at the time the contract was made. The builder might thus make what contract he could with the minor, under the assurance that a lien would be worked out for him, by a necessary ratification *

§ 31. **Married Women.**—In this State, the personal disabilities of married women being removed, they may charge their separate estate with a mechanics' lien for work ordered by them, or by any other person as their agent, and by their husbands as well as a

* McCarty *v.* Carter, 49 Ill., 53.

stranger.* And even when the work is performed for the husband as owner, if it can be shown that he acted, in fact, as agent for the wife, a lien may be secured against her as owner.†

§ 32. **Same—Proof of Husband's Agency.**—Where the husband contracts for the performance of the work on the wife's estate, there must, in the absence of collusion, be some affirmative proof of an agency to charge her interest therein, but such agency may be proved by her acts as well as by evidence of a direct authority. Thus, proof that the wife personally superintended the work, or frequently visited the buildings erected by a contract with the husband on her separate estate, and gave directions for the performance of the work, and selected the materials that entered into it, is sufficient to estop her from denying the agency.‡

The Court of Common Pleas in Hauptman *v.* Catlin,§ held, under the New York City Act of 1851, that the performance of work on the wife's estate, was of itself sufficient to establish the agency where it was done with her knowledge, and actually benefited her separate property. Judge Brady delivering the opinion of the court, said: "Whether Mrs. Catlin had power to make a contract which would bind her as if a *feme sole*, it is not necessary for the purpose of this appeal to decide. The labor performed and materials

* Hauptman *v.* Catlin, 20 N. Y., 247: Lex *v.* Holmes, 4 Phila., 10; Burdick *v.* Moon, 24 Iowa, 418; Kidd *v.* Wilson, 23 id., 464.

† Hauptman *v.* Catlin, 20 N. Y., 247.

‡ Forrester *v.* Preston, 2 Pitts. Pa., 298; Collins *v.* Megraw, 47 Mo., 495.

§ 3 E. D. Smith, 666.

purchased were for the benefit of her separate estate, and established a claim resting in contract which a court of equity would enforce (Dyott *v.* North American Coal Co., 20 Wend., 570–573). The proceeding to enforce a lien is of an equitable character and embraces such a claim."

This case was affirmed in the Court of Appeals.* But this question was not directly raised or passed upon by that court. The amount of proof necessary to establish an agency between the husband and wife under the several statutes being still an open question, we submit the weight of authority in other States, where the rights of married women, in respect to contracts, are similar to those enjoyed under our laws. It may be stated as a general rule, that the agency cannot be presumed from the marital relations alone, nor from the fact of the materials being used in the wife's property.† Nor will the mere acceptance of rent ratify the agency where the husband erected the building on the wife's estate without her knowledge at the time.‡

§ 33. **Same—A Question of Fact for the Jury.**— Where the powers and privileges of the wife are as full and free as our statutes now provide, it is a question for the jury to determine, from the evidence adduced on the trial, whether or not the husband, in contracting for work to be done upon her property, acted as her agent. A mere acquiescence is not an implication of authority, nor is the performance of acts which

* 20 N. Y., 247.

† Miller *v.* Hollingsworth, 33 Iowa, 224.

‡ McCarty *v.* Carter, 49 Ill., 53.

naturally spring from the marital relations, and which she would ordinarily do if the property belonged to her husband.*

§ 34. **Same—Collusion.**—The courts will not allow the wife by collusion with the husband, who is insolvent, or in contemplation of insolvency, to divert his capital from its natural channel for the purpose of improving her estate to the prejudice of his creditors; as such an act would be a voluntary gift by an insolvent, which is fraudulent and voidable under all circumstances. A court of equity may, in such a case, decree a sale of the property, and divide the proceedings between the creditors of the husband seeking its aid, and his wife, according to their respective interests; or lease it out, and apportion the rent until the creditors are paid.† But where both husband and wife spent their funds in the improvement of her separate estate while the husband was in debt, and it appeared that there was no fraud or collusion on her part, although she knew that he expended his own monies thereon, the judgment creditors of the husband were not permitted to enforce the lien of their several judgments against the estate to the extent of the amount invested by him therein.‡ Nor could a mechanics' lien be enforced under such circumstances; as the wife cannot thus without her consent be made the trustee of a spendthrift or improvident husband, and

* Hughes *v.* Peters, 1 Coldw. (Tenn.), 69; Corning *v.* Fowler, 24 Iowa, 584; Fetter *v.* Wilson, 12 Ky., 91; Barto's Appeal, 55 Pa. St., 386; Bliss *v.* Patten, 4 R. I., 380.

† See Barto's Appeal, 55 Pa. St., 386.

‡ Webster *v.* Hildreth, 33 Vt., 457.

hold her own lands in trust for the payment of liens in the creation of which she had no part.*

§ 35. **Agents.**—The statutes give the right of lien where the labor is performed, or the materials furnished, in pursuance of a contract, express or implied, with the owner or his *agent*. It is often difficult in practice to determine what acts are sufficient to constitute the relation of principal and agent. We have treated in the preceding Sections of the rule in this respect applicable to husband and wife, the same principle will apply in all the family relations of the parties to each other. Thus, where a son contracts for the erection of a building upon his mother's property, with her knowledge and consent, it is presumed in law to have been done by her authority. Although it has been held, that if the presumption is rebutted, special authority must be proved.† It may be safely asserted, as a general rule, that where the person making improvements upon the land of another, has no personal interest either in the building, or the lot upon which it stands, such act, if done with the knowledge, consent or approval of the owner, will, so far as the building is concerned, be deemed the act of the owner. The holder of the title to the premises should not stand by and see a contract made for work on his lands, by one who has no legal interest therein, and then set up his title to defeat the lien. He must, in such a case, give notice to the builder, or he is es-

* See Miller *v.* Hollingsworth, 33 Iowa, 224; Corning *v.* Fowler, 24 id. 584; Barto's Appeal, 55 Pa. St., 386.

† Baxter *v.* Hutchins, 49 Ill., 116.

topped from denying the agency.* And where a house was being built by A, the owner, according to plans submitted by B, under the understanding that B was to purchase the house when completed; in accordance wherewith, B purchased and placed in the cellar a furnace and heater, so affixed to the building as to become a fixture; it was held that A, by selling the property to C, became liable for the value of the improvements made by B, and that a lien might be charged against the property therefor, the liability arising from the ownership, knowledge, and consent on the principle of estoppel.†

§ 36. **Same—Several Liabilities.**—The liability of the owner personally, and that of his interest in the property, is sometimes distinct and separable; the requirements of the latter, being aided by the privity of estate, are less exacting than those of the former. Thus it was held in Mississippi, that although an administrator cannot bind the estate of the intestate for work done in the erection of a house upon the lands of the decedent, yet the house itself may be held.‡

§ 37. **Same—Special Authority.**—It may be stated as a general rule, that where the claimant relies upon the proof that the person contracting for improvements was authorized by the owner of the fee to make the same as his agent, a special authority to that effect must be shown. A general agency to take care of the property, or an agency for other purposes is not suffi-

* Donaldson *v.* Holmes, 23 Ill., 85.

† Weber *v.* Weatherby, 34 Md., 656.

‡ Weathersby *v.* Sinclair, 43 Miss., 189.

cient.* There is no hardship in this rule; the title, being on record, the mechanic is chargeable with notice that the agent is not the owner; and having that notice, when dealing with a person not having the title, or being clothed with the evidences of title, he should ascertain the source and extent of the authority of the person contracting for the performance before he relies upon the same, and failing to do so, he should bear the consequences of his negligence. A party in possession of property cannot bind the owner by his contracts, unless the authority to do so has been conferred, and the mere fact of possession is not in itself proof of such authority.†

§ 38. **Same—Superintendents, Architects, etc.**—But where it is shown that the person who ordered the work, or contracted for the material, was an agent for the owner for the erection of the building into which such work or material enters, it is not necessary to show a special authority for each particular act of such agent, so far as the liability of the building is concerned.‡ The superintendent or supervising architect is to a certain extent a special agent, and cannot bind the owner personally to such an unlimited extent as a general agent.§ The courts have therefore held it error to instruct the jury, where there was conflicting testimony as to the authority of the architect, that if they should find that the claimant, at the time of the sale of materials for the building over which the architect had charge, had reason to believe, from

* Baxter *v.* Hutchins, 49 Ill., 116.
† Id.
‡ Morrison *v.* Hancock, 40 Mo., 561.
§ Id.

the acts of the parties, that he was authorized to purchase the same, the owner was liable.*

§ 39. Lessee.—A tenant for life, or years, has an interest in lands salable under execution, he is, therefore, as to that interest, an owner within the statute.† The interest affected by a mechanics' lien against a lessee is of a twofold nature. *First*, It attaches to his interest in the lease which may be enforced by the sale of the remainder of his term, whereupon the purchaser takes possession as assignee. *Second*, It charges the interest of the tenant in the building upon which the work was performed or materials furnished,‡ enforceable—where, as between the landlord and tenant, the building may be removed—by a sale thereof, the purchaser acquiring the right of removal during the continuance of the term. The lien will attach to a building for work done thereon for the lessee as owner, and erected by him for his own use, by the permission of the owner, although the foundation was imbedded in the soil, but could be removed without damaging other buildings.§ The question as to whether the lien will attach to a building erected by a tenant, as personal property, is governed by the ordinary rules applicable to fixtures as between landlord and tenant and need not be discussed here; the purchaser under the lien, being subrogated to all the rights of the tenant for whom the erections were made.

* McDonnell *v.* Dodge, 10 Wis., 106.

† Littlejohn *v.* Millirons, 7 Ind., 125; Montandon *v.* Deas., 14 Ala. N. S., 33; Barber *v.* Reynolds, 33 Cal., 497.

‡ Ombony *v.* Jones, 19 N. Y., 234.

§ Id.

LEASEHOLD.—THE RIGHT OF REMOVAL.

§ 40. **Same- Right of Removal.**—As the purchaser succeeds to the rights, he takes subject to the conditions, reservations, and equities governing the original parties.* Under this rule it was held in Ohio, in a case where the lease specified that at the expiration of the lease, all the improvements that the lessee should make on the demised premises should revert to the lessor, and a building was erected by the lessee of a permanent nature, that a mechanic's lien for work performed on the building would only attach to the leasehold interest; and that the purchaser under the lien, being restricted to the rights of the lessee, could acquire no specific interest in such erections beyond the original term of the lease. On the other hand, the Supreme Court of Kentucky held that a mechanics' lien could not be displaced by a condition of the lease that all improvements when erected shall become the property of the lessor; that such a provision gives the lessor the improvements, but subject to the liens of the mechanics, who acquired a prior interest therein. The court reasoning that the lien would be unavailing and illusory, unless it commenced with the commencement of the building, and progressed with the progress of its execution, *pari passu*. It is inherent in and coextensive with the work and materials. Every part of the work is done, and every material is finished, subject to the lien. But no contract can be absolutely and immediately effectual, unless the subject-matter of it be actually existing, or proximately potential as the

* Oswold *v.* Buckholz, 13 Iowa, 506; Dutro *v.* Wilson, 4 Warden (Ohio), 101.

natural fruit of something that does there exist. The utmost effectuality of such a contract as the foregoing is, that it may be conditional, but cannot attach to the contingent thing, unless or until it shall actually exist. Hence the lease on which this lien is reserved, did not attach to the buildings until they had been erected. When they were completed, they were encumbered with inherent liens, relating back to the commencement of the work; and, consequently, when the lessor's right first attached to the buildings, it was attached to them as they then were, and he took them *cum onere*. This question has not yet been presented for adjudication in this State. As a mere balance of authority, the fact that the Ohio decision was predicated upon the right of removal of a structure that was in fact a fixture, and hence, not capable in any event of being removed, weakens the force of the decision, although it may not detract from the reason for the rule there established.

§ 41. **Same—Rights of Lessor in Premises charged with a Lien.**—A difference of opinion also exists as to the power of the lessor to terminate and destroy the lien, by accepting a forfeiture under the conditions of the lease. In Wisconsin,* the courts uphold such a right on the ground that the lienor, or purchaser under the lien, takes the premises subject to all the conditions of the lease, including, of course, the liability of forfeiture; while the courts in Missouri, under a clause of their statute charging the lien upon the "interest of a lessee for improvements" made by him, hold that

* Jessup *v.* Stone, 13 Wis., 466.

the lien, if perfected before the property revests in the lessor, binds the property for the full term of the lease; and that the owner must either extinguish the lien by a payment of the debt, or accept the purchaser under the foreclosure sale, as a tenant for the remainder of the term. Consequently, the landlord, by accepting a forfeiture of the lease after the lien has attached and placing another tenant in possession, renders himself liable to the purchaser for the full value of the lease at the time the lien was perfected. These decisions may be harmonized, to an extent, on the theory that after the purchaser comes into actual possession, he is subject to the terms of the lease, but that he is entitled to the lease at the time of the sale in the same condition that it was in when first charged by the lien.

§ **42. Agreement to Lease.**—The same rule applies in the case of an agreement to lease, as in an agreement of sale. When the tenant is in possession under such an agreement, his interest is chargeable. And if the agreement is perfected by the execution of the lease after the lien is filed, or the contract for materials is made, it will relate back to the date of the execution of the original agreement to lease, and charge the entire interest of the lessee.* But this rule will not apply when the person who afterwards secured a lease, was, at the time of furnishing the materials to him, a mere occupier of the property,† without any arrangement for a future lease.

§ **43. Power of Tenant to Charge the Fee.**—With-

* Montandon *v.* Deas, 14 Ala. N. S., 33.

† Davies' Appeal, 62 Pa. St., 417.

out there is an actual agency established between the lessor and lessee, the interest of the lessee is solely chargeable. The mere fact that the erections are for the permanent improvement of the property,* or that the work was done under the supervision of the owner of the fee;† or that the improvements are partially paid for by loans or advances made by the lessor to the lessee;‡ or under a statute securing a lien against the person *causing* the work to be done, that the owner gave an extension of the lease, and advanced a certain sum of money, on condition that the tenant would make certain improvements and erections on the demised property, the tenant having contracted with the mechanics for the performance of the work;§ or of the covenant in a lease requiring the tenant to make the alterations and repairs for which the lien is sought,‖ or that the owner paid some of the bills contracted by the lessee for the improvements, and gave him a certain sum towards the completion of the work,¶ will not establish such an agency as to make the estate of the lessor liable; nor will it bind him on the principle of an implied contract direct with him, if it be proven that the work was actually performed under a contract with the lessee. No lien can be created on the

* Knapp *v.* Brown, 45 N. Y., 207.

† Muldoon *v.* Pitt, 54 N. Y., 269..

‡ Stuyvesant *v.* Browning, 33 Superior Court; (1 Jones & Spencer), 203.

§ Johnson *v.* Dewey, 36 Cal., 623.

‖ Francis *v.* Sayles, 101 Mass., 435; Harman *v.* Allen, 11 Geo., 45.

¶ Trustees, etc., *v.* Young, 2 Duvall (Ky.), 582.

interest of any person as owner of the premises, except such person shall, either himself or by his agent, enter into a contract, either express or implied, for the performance of the work.*

§ 44. **Grantee of Contracting Owner.** The claimant can *acquire* no lien against any owner save the one who has contracted for the performance of the work; a grantee of the contracting owner cannot, therefore, be charged as owner; and his title to the premises will not be affected by the lien, without it was a charge upon the estate at the time such title was acquired which depends entirely upon the provisions of the statute creating the lien. The State Act, the Kings and Queens County Act, the Rensselaer and Onondaga County Acts, and the New York City Act of 1851, and of 1863 (as amended in 1866), provide that the claimant shall, *upon filing the notice*, have a lien to the extent of the right, title, and interest of the owner *at that time* existing in the property. The Cities' Act, now applicable only in Buffalo, specifically states that the lien shall take effect *from the filing thereof*. It is plain, therefore, that in this State (except under the New York City Act of 1875), the lien charges the estate of the contracting owner *upon the filing of the notice*, and only affects the rights of subsequent purchasers or encumbrancers. Hence, a sale of the premises in good faith, before the notice of lien is filed, prevents the acquisition of any lien,† even though the

* Muldoon *v.* Pitt, 54 N. Y., 269; Knapp *v.* Brown, 45 N. Y., 207.

† Cox *v.* Broderick, 4 E. D. Smith, 721; Sinclair *v.* Fitch, 3 Id., 677; Ernst *v.* Reed, 49 Barb., 367; Noyes *v.* Burton, 29 Id., 631.

purchaser had notice of the amount of the claim, and the conveyance was made subject to its payment.*

§ 45. **Same—Fraudulent Transfer.**—In the case of a fraudulent sale—as, for instance, when effected by collusion between the parties, for the purpose of defrauding the rights of mechanics and material men—the lien may, within the statutory period, be enforced in an equitable proceeding. The court having power may set aside the sale, whereupon the parties are reinstated to their original rights, and the lien may be enforced against the contracting owner.† And if the court has no equity jurisdiction, ‡ or the claimant does not elect in the lien proceeding to try the validity and *bona fides* of the transfer, he may obtain a judgment against the contracting owner, and sell all his right, title, and interest in the property when the lien was filed, and then, in an action of ejectment, contest the legality of the title of the grantee. § In such a case, and whenever the title of the purchaser is to be tested, a *lis pendens* should be filed, as a bona fide purchaser will be preferred to the claimant who subsequently files his lien, on the principle that a fraudulent sale ceases to be voidable when the property passes into the hands of an innocent purchaser for value. (See Noyes *v.* Burton, *supra.*)

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* Sinclair *v.* Fitch, 3 E. D. Smith, 677.

† Meehan *v.* Williams, 36 How., 73; Quimby *v.* Sloan, 2 E. D. Smith, 594; Schafer *v.* Reilly, 50 N. Y., 61.

‡ Quimby *v.* Sloan, *supra.*

§ Ernst *v.* Reed, 49 Barb., 367; Randolph *v.* Garvey, 10 Abb. Pr., 179; Meehan *v.* Williams, 36 How., 73.

§ 46. **Same—An Assignment for benefit of Creditors** vests the legal title in the assignee, who stands in the same position as a purchaser, for value, in respect to subsequent liens against the assignor. If the lien is not perfected by filing, prior to such an assignment, the right to acquire it is lost.* And it matters not if the assignment is subsequently recorded, provided it was executed before the lien was filed.†

§ 47. **Under the New York City Act of 1875.**—The Westchester Act of 1852 [see Part III.] provided that any person performing work upon a building under a contract with the owner, "*shall have a lien thereon* to the extent of the right, title, and interest *at the time existing of such owner.*" In that act, and in the New York City Act of 1875, the clause "upon the filing of the notice" is omitted. The effect of this omission, if uncontrolled by other portions of the statute, is to charge the lien upon the land from the time of the performance of the work, and does not restrict its origin to the filing of the notice. In the case of Blauvelt *v.* Woodworth [31 N. Y., 285], which arose under the Westchester Act of 1852, the referee found that the claimant contracted with the owner of property to build the house in question. Subsequently, and after the building was erected according to contract, but before the lien was perfected by the service of specifications, the contracting owner sold the premises to a third party, who purchased the same for

* Quimby *v.* Sloan, 2 E. D. Smith, 594; Noyes *v.* Burton, 29 Barb., 631.

† Id.; Oates *v.* Haley, 1 Daly, 338.

value and in good faith. The question at issue was whether the grantee took the property subject to the lien for the amount unpaid on the contract. Judge Porter, in delivering the opinion of the Court of Appeals, said: "By the provisions of the act in question, the mechanic who furnishes materials or labor in the construction of a building, in the County of Westchester, in conformity with the contract with the owner, has a specific statutory lien, to a limited extent, on the interest of the existing owner, and this may be enforced by judgment as in a personal action. He may lose this lien by omitting to comply with the conditions prescribed by the act; but in the case at bar, no fact is found by the referee inconsistent with the claimant's right. It is insisted by the appellant, that the lien did not attach until the specification was served on the 24th of June, and that it did not attach then as against the defendant, because he had previously conveyed the property to one Bell, after the completion of the work. In this view we cannot concur. *The lien took effect as the materials were furnished*, and the work was done. * * * The services were performed while the defendant was owner, and he could not relieve the property from the lien, nor absolve himself from his contingent liability by a subsequent conveyance to a third party." This decision, so far as it relates to the liability of the property in the hands of an innocent purchaser, I consider as fully applicable to the present statute in New York City; and that there the lien commences at the commencement of the work, and continues till the expiration of the time to file the required notice with the County Clerk, which, if prop-

THE "CITIES ACT" OF 1880.

§ 47*a*. **The "Cities Act" of 1880.**—Applicable to all the cities in the State except Buffalo, contains the clause "shall—upon filing the notice, etc.—have a lien * * to the extent of the right, title and interest of the owner, lessee or person in possession at the time of filing the notice of claim." This in itself reverts back the former rule, charging the lien only upon the estate of the contracting owner. But the sentence ends as follows: "or the successors in interest of such owner, lessee, or person so in possession, *taking with notice of said lien.*"

There is an inchoate right of lien existing from the commencement of the work palpably visible in the actual improvements or repairs into which it enters. Does the statute refer to this equitable charge, or to the perfected lien formed by the filing of the notice? If the former, then there is enough at any time to put the purchaser upon his inquiry, and bind his estate to the extent of the existing rights of the claimant. If the latter, then the provision is simply farcical, as the filing is notice to every one, and the law-givers went out of the way to state the absurd proposition that one purchasing after a lien has been perfected takes his title subject to it. Yet the latter is probably the legal effect of the section taken as a whole.

ELEMENTS OF A LIEN.

CHAPTER III.

THE CONTRACT.

§ 48. Can a Lien be created in the absence of a Contract with the Owner?—Guernsey, in his learned Commentaries on the Law of Liens, in relation to Section one of the Kings and Queens Act, says: "A party who is *permitted* by the owner to do work, or furnish materials, can acquire a lien against such owner's interest. This is something more than an *implied contract*, and is more effectual to cover all cases than the law for New York City, particularly as the latter law has been construed by the courts. Under this act, a sub-contractor could recover in a case like Walker *v.* Paine (2 E. D. Smith, 662), and Randolph *v.* Garvey (10 Abb., 179), and should also reach the lessor's interest, where he *permits* the lessee to make repairs or improvements that are a benefit to the lessor, as well as in cases where there is an executory contract to lease, or advance money, or sell the property, contingent upon the alteration or erection of buildings thereon." The same reasoning would apply to the State Act, which provides for a lien, when the work is done by the *consent* of the owner, and in a less degree to the New York City Act of 1875,

where the word "instance" is used; it becomes, therefore, an important question whether a lien can be created in the absence of a contract express or implied. It may be stated as almost self-evident that the lien must have a debt to attach itself to, otherwise it would be a security for nothing, and *ipso facto* void. So the owner must be a debtor, and the claimant a creditor, or the lien will not be enforceable at law, since the owner cannot be made, by virtue of the lien, to pay more than he *owes*,* or the claimant permitted to receive more than is *due* him. The lien law does not, and cannot, create a new and distinct liability; it simply aids in the enforcement of valid, existing claims, by creating a new security. Now, if the owner is a debtor, he must first have been a contractor; for in the Civil Law, one is said to be a debtor, who owes reparation or damages for the non-performance of his contract.† And the same consequence must follow if the plaintiff is a creditor, since "a creditor," says Bouvier, "is one who has a right to require of another the fulfillment of a contract or obligation."‡ So the lien, if a security for a debt, must necessarily be founded on contract, since "the legal acceptation of debt," says Blackstone, "is a sum of money, due by certain and express agreement, as by a bond for a determinate sum, a bill, or note; a special bargain, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." Our primary proposition may, therefore, be thus extended:

* Schneider *v.* Holbrin, 41 Howard, 232.

† 1 Pothier on Obligations, 159.

‡ 1 Bouvier's Law Dictionary, 383.

OF THE NECESSITY OF A CONTRACT WITH THE OWNER.

A mechanics' lien is only enforceable when there is an existing indebtedness; debt is always founded on contract: therefore, every lien must be based upon a pre-existing contract express or implied.

§ 49. **Same—Under the Act of 1863.**—But our position is not without precedent, the Court of Commission of Appeals passed upon this very question, so far as it is applicable to the Act of 1863, in the case of Muldoon *v.* Pitt.* The facts were these: The owners of certain premises in the City of New York leased them for a dwelling and bathing establishment, the lease containing a covenant that no alterations should be made, with certain specified exceptions, without the written consent of the lessors. Plaintiff, a builder, contracted with the lessee to make certain alterations, and to erect a building thereon. The alterations did not come within the exceptions contained in the lease. The lessors not having given their consent in writing to the changes, notified the plaintiff that the work must be done in accordance with their wishes, and, at the request of the tenant, gave directions in reference thereto, and exercised supervision over the entire work. The plaintiff filed a lien naming both the lessor and lessee as owners. The court held that the lessor was not liable as owner, for the reason that the contract was made with the tenants, and the lessors' actions did not constitute them parties to the contract. At the request of the tenant, the lessors supervised the work for the purpose of protecting their own rights merely, they not having consented to the alterations.

* 54 N. Y., 269.

It will be noted that this case came within the precise wording of Section one of the New York City Act of 1863, upon which the lien was predicated. This Section provides that "any person or persons who shall in pursuance of, or in conformity with, the terms of any contract with, or employment by the owner, *or by or in accordance with the directions* of the owner or his agent, perform any labor or furnish any materials," etc., shall have a lien. In this case, the work was done "in accordance with the directions of the owners," but the court refused to enforce the lien because such directions did not imply a contract on their part to pay for the work and materials used on the premises. "The settled construction of this Section," says Commissioner Johnson, "is that no lien can be created on the interest of any person as owner of the premises, except such person shall either himself, or by his agent, enter into a contract for doing the work, either express or implied; all this is implied in the expressions describing the conditions which are necessary to a lien. To that end the labor or materials must be furnished in conformity with a contract with, or employment by, or by the directions of the owner or his agent. Together, these phrases mean contracts express or implied, and no one is owner, in the sense of this statute, who is not contractor also for having the work or materials expended or performed upon his land."

§ 50. Same—Application to Existing Statutes—Act of 1875.—The theory of this decision, to wit, that the language of the 1st Section is to be construed and governed by the intent of the Legislature, as shown from a reading of the entire act, will serve to extend

the same principle to every act in this State. Section one of the New York City Act of 1875, has omitted the word contract, and provides for the lien whenever the work is done "*at the instance* of the owner or his agent," but it is plain that a contract by the owner is contemplated, as Section five provides that the original contractor must file his claim "within sixty days after the *completion of his contract;*" and the notice must contain a statement of the terms, time given, *and conditions of his contract*, and concludes with the following direction: "*If his contract*, or any part thereof, is in writing, a copy of such writing must be filed with and made part of his claim." And Section fourteen says that "All persons entitled to liens on the structure or improvement, *except those who contracted with the owner thereof*, shall be deemed sub-contractors."

§ 51. **Same—Kings and Queens Act.**—So under the act for Kings and Queens Counties,* one who performs labor, or furnishes materials for a building by virtue of a contract with the owner, "or any person *permitted* by the owner of such lands, to build, alter, repair, or improve, as aforesaid," shall have a lien. Here a simple permission is all that is requisite under the first Section, but that the *permission* must be under circumstances that will raise a presumption of an absolute implied contract is evident from other provisions of this statute. The same Section provides that the owner shall not be obliged to pay on account of the building, "in consideration of all the liens authorized by this act to be created, *any greater sum or amount than the*

* See Part III., Statutes.

price stipulated and agreed to be paid therefor in and by such contract." If, then, he has not "stipulated and agreed" to pay for the work, the lien utterly fails, as he is obliged to pay nothing on account of such building.

§ 52. **Same—The "State," "Buffalo," and "Onondaga" Acts.**—The State Act, as amended in 1875,* gives the mechanic a lien whenever the work is done upon a building "with the *consent* of the owner." The language of this entire act, as remodeled by the amendment of 1873,† is extremely liberal in its provisions in favor of mechanics and material-men. But under it the estate can only be charged to the extent of the owner's indebtedness to the original contractor, and such indebtedness must be founded upon a contract either express or implied. The same may be said of the Buffalo Act, which provides that the work shall be done "for the owner."‡ The Onondaga Act expressly provides that the work shall be performed in pursuance with a contract with the owner. It is evident, therefore, not only from the necessities of the case, but from the general scope and meaning of the different statutes, that every lien must be founded upon a valid existing contract express or implied.

§ 53. **Implied Contracts.**—In the case of Walker *v.* Paine,§ the Court of Common Pleas held that a mere implied agreement, such as may be inferred from the owner's suffering improvements to be erected on his premises, that he will pay what the same are reason-

* See Part III., "Statutes."
‡ See " " "
† See " " "
§ 2 E. D. Smith, 662.

ably worth, is not such a contract as can form the basis of a mechanic's lien in behalf of a sub-contractor. This decision, taken in connection with the fact that under the several acts the owner cannot be held liable to an extent exceeding the amount he has stipulated to pay on account of the building or improvements, would seem to restrict the right of lien to cases where the owner has entered into an express agreement, under which the work was performed, or material furnished for which the lien is sought. This theory is favored by many decisions of other State Courts; thus, in Massachusetts, under the law extending the right of lien to "any person who shall actually perform any labor, * * * by virtue of any contract with the owner, or other person who has contracted with the owner," the Supreme Court * held that to entitle a workman to a lien, an express contract must have been entered into with the owner; and that a claim arising from an implied contract was not sufficient, especially where the claimant is a sub-contractor; as such a lien is of a novel and extraordinary character in rendering the owners of real estate liable to have their property sold, not only to enforce the performance of their own contracts, but also to secure the fulfilment of contracts to which they are neither party nor privy. Such statutes should be construed strictly, not only because they are in derogation of common law, but also in order to prevent the hardship and injustice which might result from too great latitude in their interpretation. Besides, it would lead to great uncertainty and confusion in

* Parker *v.* Anthony, 4 Gray (Mass.), 289.

titles to real estate, and to collusion and fraud in the settlement of accounts, if liens were allowed to accrue upon implied contracts which are necessarily unliquidated, and which in themselves contain no certain elements by which their amount can be ascertained and adjusted. But by making an express contract the basis of a lien, the owner of real estate can always readily ascertain the extent of his own liability; and a contractor, in case of his own insolvency, would have no opportunity of increasing the claim for services by collusion with the laborer or mechanic, when it was to become a charge on the estate of his employer, beyond the amount he was to be personally liable in case he had satisfied the claim.

§ 54. **Same—Must be Explicit—Day's Work.**—So under a similar statute in the same State, the court held that even an express contract to build a house at a certain price per day for the contractor's own services, with power to employ such workmen as he shall deem necessary, and at such prices as he shall consider fair and reasonable, is not such a certain and definite contract as that contemplated by the lien act,* and in both Massachusetts † and Mississippi ‡ it has been held that a mere hiring by day's work is too indefinite to give a lien. The statute provided, in the former State, that any person to whom money shall be due for labor expended in the erection or repair of a building, shall have a lien to an amount "not exceeding the amount of his contract." This plainly shows, says the court,

* Sanderson *v.* Taft, 6 Gray (Mass.), 533.

† Wilder *v.* French, 9 " " 393.

‡ Myers *v.* Buchanan, 46 Miss., 420.

that the contract under which a lien may arise, must be of such character and upon such terms and stipulations between the parties, that the amount which may be earned under it may in some way be ascertained and determined with certainty. The contract must be in express terms and for the accomplishment of a definite purpose, and so certain in amount that the owner, the contractor, or any party subsequently acquiring an interest in the property, may know at any time the exact amount of the encumbrance upon the land. It would undoubtedly be sufficient, if it provided for any designated object, such, for instance, as the erection of a dwelling-house, the repair of the whole or of any definite part of a building, to be completed within a specified time, and at a fixed or stipulated price, or for a sum to be ascertained by computation allowing for labor actually expended at an agreed rate of compensation for each day's labor; but a contract for mere day's work is not of this character.* Although the question has not specifically arisen in this State, there is no doubt in my mind that a mere contract for work to be performed generally, whether the payment is by day's work or by the month, will not give the workman a lien, as he performs his services entirely on the personal credit of his employer, and not of the building whereon he may be employed. But where one contracts for the erection of a specific building, it matters not how he is to be paid, provided the amount due can be arrived at by computation, and if by day's work, but without naming a time for the payment, his lien

*Wilder *v.* French, 9 Gray (Mass.), 333.

will be valid upon the completion of the building, although it cannot be previously enforced on account of the contract being entire and the payment indivisible.*

§ 55. **Same—Contract must Precede the Performance—Implied Assumpsit.**—The Supreme Court, in the case of Hatch *v.* Coleman,† held under the Westchester Act of 1852, which provides for a lien in favor of "any person who by virtue of any contract with the owner thereof, or his agent, or a person who in pursuance of an agreement with such contractor shall, in conformity with the terms of such contract, furnish materials in building any house," that such materials must be furnished under a pre-existing express contract, and that it did not extend to the case of lumber delivered under an implied assumpsit merely, the court remarking that, where the evidence shows that the owner was building a house, and the material-man delivered to him a certain quantity of lumber which was used by him in the erection of his building, the only liability of the owner is one of implied assumpsit. It will not do to imply a previously existing contract from the fact that the materials are furnished. It is true that the law will raise an assumpsit to pay; but it will not go so far as to raise the presumption that they were furnished in pursuance of a previously existing contract to furnish them.‡ This distinction between implied asssumpsit and implied contract is exceedingly fine, but in the sense here given, it actually exists. It is in effect a

* Cunningham *v.* Jones, 3 E. D. Smith, 650; and see Neville *v.* Frost, 2 Id., 62; White *v.* Hewitt, 1 Id., 95.

† 29 Barb., 201. ‡ Id.

distinction of time. Thus a liability arising solely from a promise, either express or implied, to pay for work previously rendered, without any request or agreement on the part of the promiser, is simply evidence of a contract to *pay*, not to *perform*. It attaches from the force of the promise at the time when it is made, and cannot be construed as a contract for the future performance of work, such as is required by Section one of the Onondaga Act, which provides that the work shall be done in pursuance with a contract express or implied. The contract, under all of our statutes, may be implied as well as expressed,* but the acts or circumstances forming the basis of such implication, must exist before the work or labor is performed. In other words, the labor or materials must be furnished either under an express contract with the owner, or under circumstances that will reasonably imply a pre-existing contract, or at the least such a direction on the part of the owner as will culminate into a valid contract, by the mere performance of the labor or furnishing of the materials. The "permission" or "consent" of the owner is sufficient, provided the circumstances are such that it is in effect a direction; and provided, also, that the work is performed in pursuance therewith, and not by virtue of a contract with the lessee of the owner, or some other person having a personal interest in the property, or to whom the mechanic looked personally for his remuneration. What will amount to an implied contract, may generally be determined by applying the principles

* Spencer *v.* Barnett, 35 N. Y., 94; Knapp *v.* Brown, 11 Abb. N. S., 118; Meehan *v.* Williams, 36 How., 73.

governing the old common law declaration of assumpsit. No lien can be enforced without the person standing in the position of original contractor, can recover a judgment against the owner on an express or implied assumpsit.

§ 55 a. **Payment in Kind or by Specific Property.**— The statute provides that every person performing labor upon a building at the instance or under a contract with the owner, shall be entitled to a lien. Although the contract must be specific, that is for the particular work or materials for which the lien is sought, and which comes within the meaning of the statute, yet the mode of payment is not specified in the act; therefore, any payment agreed upon between the parties may be enforced by the lien. Thus, where the mechanic was to be paid for his work by the conveyance to him of certain lots,* or a house,† or partly in money, and the balance in goods‡ or material,§ or by the services of the owner, a lien may be secured and enforced under the statute.‖ So where two mechanics entered into an agreement whereby they were to assist each other on their respective buildings, and when done, to balance the accounts and pay the difference, if any, in cash; the court held that a contract existed within the meaning of the statute, and that the one in arrear, on refusal to strike the balance and pay his deficiency, is chargeable as owner, and a lien may be en-

* Protection Ins. Co. *v.* Hall, 15 B. Mon. (Ky.), 411.

† Haviland *v.* Pratt, 1 Phila., 364.

‡ Campbell *v.* Scaife, 1 Id., 187.

§ Hinchman *v.* Lybrand, 14 S. & R. (Pa.), 32.

‖ Reiley *v.* Ward, 4 Iowa, 21.

forced against his property for the amount due.* Whenever the work is to be paid for by some act on the part of the owner, such as the execution of a deed to property or the delivery of chattels, or by the performance of other work on his part, the lien will act as a security for the performance of such act,† and the claimant may, after the completion on his part, demand the performance of the act by the other called for by the contract, and on refusal enforce the lien for the money value thereof, if it is of a definite and certain value, or he may waive the contract and recover under a *quantum meruit*.‡ An obligation to deliver property gives to the party entitled to receive it a claim, the nature and amount of which may be stated, and if the obligation be not complied with, an action for money to the extent of the value of the property to be received may be sustained; § but no money claim can accrue until there is a default in the original contract,‖ nor until a demand and refusal.

§ 55 b. **Same—The New York City Act of 1875** [§ 16], specifically provides that "Whenever by the terms of his contract, the owner has stipulated for the delivery of bills, notes, or any other species of property in lieu of money, the judgment must direct that such substitute be delivered or deposited as the court may direct, and the property affected by the liens can only be directed to be sold in the default of the owner

* McCall *v.* Eastwick, 2 Miles, 45.

† Protection Ins. Co. *v.* Hall, 15 B. Mon. (Ky.), 411.

‡ See Reiley *v.* Ward, 4 Iowa, 21.

§ See Ward *v.* Howard, 12 Ohio St., 158.

‖ Monroe *v.* Bishop, 29 Geo.

to deliver such substitutes within such terms as may be directed." The amount of the lien in such a case would doubtless be determined by the value of the property to be taken in payment, since the courts will carry their intentions of the parties so far as the same can be done under the circumstances.

§ 56. **Character of the Contract—Legality.**—Legality and certainty are two of the most essential elements in a lien-contract. The work must not only be done in pursuance of a contract with the owner, but that contract must be capable of enforcement between the original parties. Illegality and fraud not only nullify contracts but all attaching securities. Thus where the building is being erected for illegal purposes, to the knowledge of the contractor, or the contract is obtained through fraud, no lien can be acquired thereon or thereunder.* Nor can a valid lien be predicated upon a contract void under the statute of frauds,† or which cannot be enforced in a personal action on account of the statute of limitations.‡

§ 57. **Same—Certainty.**—A legal contract for the performance of labor, or the furnishing of materials, is not sufficient under the statute, without it specifies or implies the application thereof. A structure or improvement within the terms of the statute, must have been in the minds of the parties at the time of the execution of the contract, or during the entire period of the performance,§ and the goods must be sold for

* Allen *v.* Ogden, 1 Wash. U. S. C. C., 174.

† Loonie *v.* Hogan, 5 Selden, 435.

‡ Yeates *v.* Weeden, 6 Bush. (Ky.), 438.

§ Cotes *v.* Shorey, 8 Iowa, 416.

that specific purpose,* and for the specific house on which the lien is sought.† But it is not necessary that the precise locality of the building should be designated by the contract.‡ or known to the contractor at the time,§ and if under a contract materials are furnished for a block of buildings, a lien may be enforced upon any of them.‖

§ 58. Same—Proof.—But the absence in the contract of the designation or purpose of the work or material or the mere fact that they were charged in the book of the material-man to the contractor or owner generally,¶ will not debar the enforcement of a lien, provided it is affirmatively proven that credit was actually given to the building in question. A tacit understanding is as good as an express one, and the fact that the goods were actually furnished and used in a building, creates the presumption that they were contracted for that purpose.** As a general rule it may be stated that the stipulations of a building contract bind the parties

* Chotean *v.* Thompson, 2 Ohio, 114; Hills *v.* Elliot, 16 S. & R., 56; Hill *v.* Bishop, 25 Ill., 349; Esslinger *v.* Huebner, 22 Wis., 632; Chapin *v.* Persse, 30 Conn., 461; Hause *v.* Carroll, 37 Mo., 378.

† Hills *v.* Elliot, *supra;* Buckhart *v.* Reisig, 24 Ill., 529; Horton *v.* Carlisle, 2 Disney (Ohio), 184; Houghton *v.* Blake, 5 Cal., 240.

‡ Chotean *v.* Thompson, 2 Ohio, 114.

§ Atkins *v.* Little, 17 Minn., 353.

‖ Croskey *v.* Coryell, 2 Wharton (Pa.), 223; McAuley *v.* Mildrum, 1 Daly, 396.

¶ Presbyterian Church *v.* Allison, 10 Pa., 413.

** Power *v.* McCord, 36 Ill., 214; Martin *v.* Eversal, Id., 229.

and all persons claiming under them. Thus the claimant who is a sub-contractor, is bound by a stipulation in the original contract to the effect that the builder shall forfeit a certain sum per day for every day that the building remains unfinished after the specified time for its completion has expired.* And so the owner will be estopped from claiming any greater rate or deduction than that named in the contract. It is an absolute case of liquidated damages.† So where the contract stipulates for the performance of the work to the satisfaction of the superintending architect, the contractor must in a lien proceeding against the owner, produce either the architect's certificate or show that it is fraudulently withheld.‡ And the mere fact that the owner did not require or receive such certificates for the intermediate payments, does not amount to a waiver of the final certificate upon the completion of the work; § but if the architect unreasonably and in bad faith refuses the certificate, the builder, under such a contract, may recover upon furnishing other proof of performance.‖

§ 59. **Same—Effect of Covenants against Liens.**—Where the builder stipulates that he will not file a lien upon the structure to be erected, he will be deemed to have waived his statutory rights, and will be

* O'Donnell *v.* Rosenborg, 14 Abb. N. S., 59.

† O'Donnell *v.* Rosenborg, Id; Gillen *v.* Hubbard, 2 Hilt., 303.

‡ Barton *v.* Herman, 11 Abb. N. S., 378.

§ Id.

‖ Thomas *v.* Fleury, 26 N. Y., 26.

estopped from enforcing a lien.* But the builder will not be bound without the intention to waive his rights are very clear and explicit. Thus in Pennsylvania the Supreme Court held that a stipulation in a contract on the part of the contractor that no other person or sub-contractor should file liens upon the building, does not prohibit the contractor from filing a lien to secure his own rights;† and although a stipulation in the building contract, by the contractor, to *indemnify* the owner against all liens on the property may estop him from enforcing a lien, it will not cut off the rights of sub-contractors, for the owner has specially provided for the effect of their liens.‡ In the case of Hartman *v.* Barry,§ decided in the Supreme Court of Missouri, in 1875, it was held that a sub-contractor who in connection with the contractor was a surety for the owner as principal in a bond given to a purchaser under a trust deed providing for the delivery of the building when completed "free from all mechanics' liens, and other indebtedness of whatever character growing out of the completion of the same, or in any way appertaining thereto," was not thereby estopped from subsequently, and before the completion of the building, filing a lien thereon. Judge Adams, in delivering the opinion of the court, said; "The object was that the deed of trust might not be swept away by liens filed under the mechanics' lien law. There is no allegation in the

* Mulrey *v.* Barrow, 11 Allen (Mass.), 152; Poillon *v.* The Mayor, etc., 47 N. Y., 666; and see Chapter on Waiver, *post.*

† Young *v.* Lyman, 9 Pa., 449.

‡ Whittier *v.* Wilbur, 48 Cal., 175 (1874).

§ 56 Mo., 487.

answer that Bates (the purchaser) was injured, or if injured, to what extent. The bond itself would not operate as a bar or estoppel against filing liens. If Bates lost her money, or any part thereof, by means of such liens being filed, the damage so sustained might have been set up as a counter-claim."

§ 60. **Performance of the Contract.**—It is evident, since the owner cannot in a lien proceeding in favor of either a contractor or sub-contractor be made to pay more than he owes under his contract, or on account of the work, that performance is a condition precedent to the enforcement of a lien, except where the contractor is excused from performance by some act of the owner. The decisions upon this point are multifarious, but always as between the contractor and owner, and generally as between sub-contractor and owner, the right of enforcement depends upon the right of recovery by the contractor in an ordinary action of assumpsit.

§ 61. **Same—Abandonment.**—Where the contractor wilfully abandons a contract,* or is prevented by insolvency or otherwise from completing it;† and whenever there is no money due to the contractor, under the contract,‡ a lien cannot be enforced by any one against the owner.§

* Malbon *v.* Birney, 11 Wis., 107; Linn *v.* O'Hara, 2 E. D Smith, 560; Thompson *v.* Yates, 28 How., 142.

† Henderson *v.* Sturgis, 1 Daly, 336.

‡ Schneider *v.* Hobein, 41 How., 232.

§ Randolph *v.* Garvey, 10 Abb., 179; S. C., 19 How., 505; Tucker *v.* Geraghty, 1 E. D. Smith, 687; Hauptman *v.* Halsey, Id., 668; Sullivan *v.* Brewster, Id., 681; Dixon *v.* La Forge, Id., 722; Kinney *v.* Sherman, 28 Ill., 520.

§ 62. **Same—The Sub-Contractor.**—Although the recovery by a sub-contractor is limited to the amount due to the contractor by the terms of the building contract,* yet the equities of mechanics or material-men are superior to those of the owner, and the court will award to them the amount equitably due the contractor at the time of his abandonment of the original contract, whenever it can be done without conflicting with well-settled principles of law. Thus where the contractor became insolvent and made an assignment for the benefit of creditors, at a time when there were no payments upon the building contract due him, and a sub-contractor, having filed a lien, completed the building for the assignee, the owner reserving from his payments the amount of the lien; the court held that upon the completion of the contract, the sum so detained should be paid to the lienor.† So where a builder is employed for the construction of a house, without any special agreement as to the manner of performance, the payments to be made as the work progressed; or where the original contract is so deviated from by the directions of the owner as to amount to a general employment upon the building in question, and entitle the contractor to recover under a *quantum meruit*, sub-contractors may enforce their liens for the amount of work done or materials furnished by them under an implied obligation on the part of the owner to pay what they were reasonably worth.‡

* Nolan *v.* Gardner, 4 E. D. S., 727; Grogan *v.* Mayor, etc., of New York, 2 Id., 693; Schneider *v.* Holbein, 41 How., 232.

† Henderson *v.* Sturgis 1 Daly, 336.

‡ Smith *v.* Coe, 2 Hilton, 365; Schwartz *v.* Saunders, 46 Ill., 18.

§ 63. **Same—Substantial Performance.**—This balance of equities in favor of sub-contractors, often shields them from the necessity of a literal performance of the original contract. Under ordinary circumstances, the contractor must fully complete his work before he can demand his pay for its completion; but the courts have been led by the hardship of individual cases, in deciding upon building contracts, to allow to a sub-contractor a recovery to the extent of the work completed, where there has been a substantial compliance in important particulars if the facts will warrant the presumption that the work has been accepted by the owner.* Thus a mere delay of blinds for two months, without the special fault of the contractor, would not prevent the parties from considering the contract complete,† and, as between the builder and other creditors, if the owner waives a full performance in minute particulars, a valid lien may be created thereon in the absence of actual fraud or collusion.‡ The rule seems to be drawn more strictly in regard to the mode than to the time of performance; the owner having the right to insist that the work shall be done in the precise manner agreed upon.§

§ 64. **Same—Deviation by the Contractor.**—The contractor is held to a strict as well as a complete performance. Any variance between the contract and the

* Henderson *v.* Sturgis, 1 Daly, 336; Lutz *v.* Ey, 3 Abb., 475; but see to the contrary on general principles, Smith *v.* Brady, 17 N. Y., 173.

† Id.

‡ Stewart *v.* McQuaide, 48 Penn., 191.

§ Smith *v.* Coe, 2 Hilton, 365, and see the following Section.

performance is fatal, without it was ordered or approved by the owner. All the material specifications of the contract must be obeyed, both as to the time and the manner of performance, or the contractor cannot recover either under the contract or on a *quantum meruit*.* A performance substantially in the mode prescribed is insufficient, even though the owner should subsequently occupy the building.† This rule is founded on the policy of securing the full and faithful performance of all contracts, which clearly express what is to be done, for the reason that any laxity would afford encouragement to parties to execute their contracts as their interest or caprice dictated. The consideration that it may, in individual cases, inflict upon the defaulting contractor a very heavy punishment, by giving the owner what he has done without paying for it, is not so important as its healthy and beneficial effect, as a general rule. The owner is supposed to know, and contract for, just the style and character of a house that he wants, and if a single deviation is allowed, he may be compelled to pay for anything, how far soever it may differ from what the contract stipulated.‡ "Every one," says Judge Comstock in the case of Smith *v.* Brady,§ "has a right to build his house, his cottage, or store, after such model and in such style as shall best accord with his fancy. The specifications of the contract become the law between the parties, until voluntarily changed. If the owner prefers a plain, sim-

* Smith *v.* Coe, *supra*.

† Smith *v.* Brady, 17 N. Y., 173.

‡ See Ellis *v.* Hamlin, 3 Taunton, 52.

§ 17 N. Y., 173–187.

ple, Doric column, and has so provided in the agreement, the contractor has no right to put in its place the most costly and elegant Corinthian. If the owner, having regard to strength and durability, has contracted for walls of specified materials, to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he has engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions, on which payment is due, have not been performed, the right to demand does not exist."

§ 65. **When Performance is Excused—Waiver—By the Act or Consent of Owner.**—There are circumstances under which performance by the contractor is excused, and he may maintain a lien under a *quantum meruit* for the work done, or under the contract for the proportional amount of performance rendered. The claimant will be entitled to the benefit of a lien if the failure was caused either by the consent or fault of the owner.* The owner will be deemed to have waived the element of time in the building contract, where he has delayed the performance by changing the plans or otherwise,† or by an extension of time.‡ It is held in Illinois that suffering the contractor to com-

* Foley *v.* Gough, 4 E. D. Smith, 724; Dennistoun *v.* McAllister, Id., 724.

† Montandon *v.* Deas, 14 Ala., 33.

‡ Rockwood *v.* Woolcott, 3 Allen, 458.

plete the contract after the specified time, and accepting the same when finished;* and in Maryland, permitting the sub-contractor under such circumstances to complete it,† amounts to a waiver of the performance within the time specified in the original contract. The same rule will apply, it seems, where the owner himself completes the building, provided it is simply a failure of the time stipulation in the contract, and not a wilful abandonment by the contractor.‡

§ 66. **Same—Effect of a Completion by the Owner under the Contract.**—Where the contract is silent as to the effect of a default on the part of the contractor, the owner, by completing the building after there has been a practical abandonment on the part of the contractor, does not waive his right to consider the original contract as entirely null and void; since he cannot be put to the election, either to waive the breach by the contractor, or surrender all of his interest in the building;§ but where the owner completes the building under a special clause in the contract, empowering him to complete it at the cost of the contractor, he shall be deemed to have acted for the contractor, and sub-contractors will be entitled to the amount due under the contract after deducting the cost of its completion.‖

§ 67. **Same—Default by the Owner.**—If there is a

* Nibbe *v.* Brauhn, 24 Ill., 268.

† Jordan *v.* Pumphrey, 36 Md., 361.

‡ Jorda *v.* Gobet, 5 La. An., 431.

§ See Smith *v.* Brady, 17 N. Y., 173; Smith *v.* Coe, 2 Hilton, 365.

‖ Gillen *v.* Hubbard, 2 Hilton, 303; Foley *v.* Gough, 4 E. D. Smith, 724.

breach of contract on the part of the owner, he cannot set up a subsequent default of the contractor as a defense in a lien proceeding by such contractor, or any one acting under him.* There seems, however, to be a distinction between a failure to pay and a failure to perform, inasmuch as the latter always, and the former generally, debars the owner from pleading the non-performance by the contractor. In Illinois the courts hold that the mere failure to pay the consideration for the work as it progresses, according to the terms of the agreement, is not such an act or omission on the part of the owner as to justify the contractor in not completing the contract.† I cannot possibly perceive how the failure to perform the contract by the non-payment of money, is any less default than by the non-delivery of materials, since the builder depends upon both alike in the performance of the work on his part. If a distinction exists, it should place the money performance as of the most importance, since the builder would then be in a position to supply the materials himself, contracted by the owner. I think our courts, when the question comes before them, will not allow the owner to defeat a lien by pleading an abandonment caused by his own refusal to furnish the funds called for by the contract.

§ 68. **Same—Effect of Fraud.**—The owner cannot take advantage of the terms of a contract entered into through fraud on his part, to defeat the contractor's

* Bushfield *v.* Wheeler, 14 Allen (Mass.), 139.

† Palm *v.* O. & M. R. R., 18 Ill., 220; Christian County *v.* Overholt, Id., 223; Kinney *v.* Sherman, 28 Id., 520.

lien to the extent of the work done or materials furnished. The principle that equitable relief will not be granted to a suitor unless he comes into court with clean hands,* would apply in such a case.† But a contract founded in fraud is voidable only at the option of the innocent party, it is not absolutely void *per se*, for the contractor may treat it as valid, and hold the owner to its strict performance if he so elects. This power of election is vested solely in the injured party; no one can exercise it for him. This strict rule of law deprives subcontractors, or the laborers and material-men from rescinding the contract between the original parties in such a case. The liability of the owner is to the contractor, for damages for the fraud, in case he elects to abandon the contract on that account; such a liability cannot be made the subject of a mechanics' lien on the part of the sub-contractors. They cannot waive the fraud and sue for the work done; first, because the election is personal to the contractor, and second, because the owner would still be liable to the contractor for the fraud, and thus subjected to double damages.‡ The effect of the decision of Linn *v.* O'Hara, is to give sub-contractors a right of lien in such a case, only where the contract is entirely performed by the contractor. The difficulty in the case arises partially from the fact, that the moment the contract is rescinded, the work is not performed in pursuance with

* Tripp *v.* Cook, 26 Wend , 143.

† Martine *v.* Nelson, 51 Ill., 422.

‡ Linn *v.* O'Hara, 2 E. D. Smith, 560; and see Cunningham *v.* Jones, 3 Id., 650; Nolan *v.* Gardner, 4 Id., 727; Dennistoun *v.* McAllister, Id., 729.

a *valid contract*, which would seem to defeat the lien where such a contract is essential to its existence. But I do not see why such a pre-existing implied contract would not be presumed as to give the contractor a lien under any of our statutes for the work actually performed. It has been held that where the contractor, through unfair means, secured an exorbitant price for the work to be done under the contract, the court will only enforce a lien for the actual value of the work and materials furnished under it.*

§ 69. **Same—Mutual Mistake.**—Where parties enter into an agreement, through a mutual mistake as to the nature and extent of the work, the court will always relieve either of the contractors from a performance. It probably would try the question collaterally where the claimant abandons the contract on account of such mistake, and seeks to enforce a lien for the work done. And where the contractor enters into a contract, relying upon the representations of the owner, as to the character of the work required for its performance, he may, if he does not inspect the same until the contract is completed, enforce a lien for the enhanced value of the work over and above the contract price, necessarily performed on account of the misrepresentations of the owner, whether made through fraud or mistake.† But it seems if the builder, in such a case, had ascertained before the completion of the contract, that the work was of a more expensive character than it was represented to be, he

* Odd Fellows' Hall *v.* Masser, 24 Pa., 507.

† Martine *v.* Nelson, 51 Ill., 422.

should have notified the other party at once, and either abandon the contract, and recover the value of the work done, or complete it for the contract price.*

§ **70. Rules governing the Right of Lien.**—As a resume of the principles governing the right of lien, as affected by the contracts between the several parties to it, the following general rules are submitted :

1st. Every lien must be based upon a valid pre-existing contract, express or implied.

2d. Strict and full performance must be shown, on the part of the claimant and the contractor, and of all persons standing between the claimant and the owner, unless excused by the act or assent of the person contracting for such performance.

3d. The lien cannot be enforced, without the owner is chargeable in an action of assumpsit in favor of the contractor, for the value of the work done, or materials furnished; nor without the claimant can maintain a similar action against the person contracting therefor.

4th. The equities of the persons performing labor and furnishing materials, are superior to those of either the contractor or the owner.

* See Martine *v.* Nelson, 51 Ill., 422.

ELEMENTS OF A LIEN.

CHAPTER IV.

THE WORK AND MATERIALS.

§ 71. **In General.**—The several statutes in this State unite in extending the lien to all work and materials used in the erection of, or in altering, improving, or repairing any building, or the appurtenances thereto. This includes all work or materials that ordinarily enter into or are used in the construction of a building, and which are contained either expressly or impliedly in the terms of a building contract.*

§ 72. **Incidental Expenses.**—It is not necessary that the work should be done, or the materials used directly upon the improvement itself, provided it was required for the performance of the contract with the owner. Thus, where the contract imposed upon the builder the duty of removing rock from the surface of the land preparatory to laying the foundation walls, the court held, that the powder and fuses used in blasting, being necessary to the performance of the contract, must, when actually furnished and used, be classed within the list of things denominated in the

* The Hazard Powder Co. *v.* Byrnes, 12 Abb., 469; Butler *v.* Rivers, 4 R. I., 38; McDermott *v.* Palmer, 8 N. Y., 383; Wood *v.* Donaldson, 17 Wend., 550.

lien law as "materials in building," and for which a lien may be acquired.* So, work done by means of derricks in hoisting the materials used in the building,† is within the statute; and, it seems, a claimant by alleging that it came within the terms of the original contract, may secure a lien for work and materials furnished for the contractor, in rigging up such an apparatus,‡ or for labor and materials in putting up lightning rods.§ Where the labor of hauling materials to the building is indispensable to the performance, a lien may be enforced therefor,‖ and the hauling away of dirt for the foundation, or the debris of the building, will fall under the same rule.¶ But the work must be done either upon, or for, the building, as well as called for in the building contract. A lien will not attach for painting a fence, under a statute limiting the right to work done in "repairing a house."** So, claims for ferriage, postage, etc.,†† or for cooking, done upon the grounds, for the men engaged in the work, under an employment by the contractor, ‡‡ are not within the provisions of the statute.

§ 73. **Money** is not *materials*, in the sense used in the lien laws, and one who furnishes funds to the con-

* The Hazard Powder Co. *v.* Byrnes, 12 Abb. Pr., 469.
† Tizzard *v.* Hughes, 3 Phila., 261.
‡ Dixon *v.* La Forge, 1 E. D. Smith, 722.
§ Quinn *v.* Sloan, 2 Id., 594.
‖ *In re* Hope Mining Co.,1 Sawyer, U. S., 710.
¶ Hill *v.* Newman, 38 Penn., 151.
** First Nat. Bank of Salem *v.* Redman, 57 Me., 405.
†† Wilamette Falls *v.* Remick, 1 Oregon, 169.
‡‡ McCormick *v.* Los Angelos, 40 Cal., 185.

tractor, to aid him in the completion of his contract; or who loans money to the owner, to be used in the erection of a building by him, or for the payment of laborers and material-men, cannot acquire a lien under the statute.*

§ 74. **Specific Statutes.**—Mechanics' liens are of statutory origin, and show a constant growth in the powers and privileges afforded to claimants. Under the original act of 1830, the mechanic only was entitled to a lien. Both of the acts of 1844 provided for material-men as well as mechanics, and the right was finally extended to all sub-contractors and laborers. Previous to 1870, the lien was confined to the erection, alteration, or repair of buildings and their appurtenances; but the Legislature in that year extended the application of all statutes previously passed to bridges, trestle-work, and other structures connected with railroads;† and in 1872, to wharves, piers, bulkheads, and bridges, and structures connected therewith.‡ These amendments, however, cannot affect the State Act of 1873, or or the New York City Act of 1875, as they are specifically applicable to statutes *previously passed*.

§ 75. **Same.**—In respect to what may be termed *private* property, no enlargement was made in the terms of any statute until 1875, when the New York City Act was made applicable to "any building, vault, wharf, fence, or any other structure in the City or County of New York," and to grading, filling in, and otherwise improving any lot in said city and county, and the side-

* Godeffroy *v.* Caldwell, 2 Cal., 487.

† Laws of 1870, Chap. 529; see Part III.

‡ Laws of 1872, Chap. 669; see Part III.

walk or street in front of or adjoining the same,* and at the same time the State Act was amended so as to include any "house, building, or appurtenance to any house, building or *building-lot*, including fences, sidewalks, paving, wells, fountains, fish-ponds, fruit and ornamental trees, and every improvement whatever to any such house, building or building-lot."† The peculiar provisions of these amendments will be noticed in the consideration of the several acts. The other statutes in this State remain as before, save as amended in 1870 and 1872; it will be necessary, therefore, to speak briefly of what is included in the term "buildings or their appurtenances."

§ 76. **What is included in the term "Buildings."**—A building is a structure erected upon and attached to the freehold; but a structure may be a fixture and not a building; walls, fences, gates, etc., are structures but not buildings. Taken in its broadest sense, a building can mean only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice such as a house, a store, a church, a shed, etc.‡ The common well-understood meaning must have been understood by the law makers, which includes those structures only which have a capacity to contain, and are designed for the habitation of man or animals, or the sheltering of property.§ A place of shelter is prob-

* Sections 1 and 2, Laws of 1875, Chap. 379, and see Part III.

† Laws of 1875, Chap. 233;

‡ Truesdell *v.* Gay, 13 Gray (Mass.). 311.

§ La Crosse & Milwaukee R. R. Co. *v.* Vanderpoel, 11 Wis., 119

ably the most concise definition, and may be given as a test-line between a mere structure as such, and a building. Thus a high brick wall erected on three sides of a furnace-stack standing at the base of a hill, to protect it from earth-slides, is not a building,* it being built for protection and not for shelter. The *fact* is often of more consequence than the intent; thus, if this same structure was inclosed on the fourth side and covered, it would doubtless become a building, as it would then be in fact a place of shelter, although not intended for one.

§ 77. **Same—Must be annexed to the Freehold.**—Mechanics' lien laws were provided by the Legislature for the purpose of creating liens upon real estate. At common law the mechanic had a lien on personal property benefited by his labor, but this lien being a mere possessory right, could not apply to real estate, which is incapable of manual possession. The statutory remedy simply extends the same right to real estate, by giving the mechanic a charge thereon in the nature of a mortgage-lien. As the law pertains only to the realty, it follows that, to come within the intent of the statute, the structure should be so affixed to the soil as to become a part of the realty. Thus, in New Jersey, the Supreme Court held, that a floating dock attached to the defendant's land, and which was built in sections on other portions of his land, was not a building within the meaning of the statute, because it did not stand upon a lot or curtilage.† But on the other hand, the Supreme Court of Arkansas held, that

* Truesdell *v.* Gay, 13 Gray (Mass.), 311.

† Coddington *v.* Dry Dock Co., 2 Vroom (N. J.), 477.

a wharf-boat is a building within the meaning of the statute, as it is attached to the soil, and appertains to the realty.* So, in Indiana, the Court held that the term "any building" comprehended a building with perpendicular walls and a shingled roof, used as a floating but stationary warehouse, notwithstanding a clause in their statute to the effect that "the court shall render a decree for the amount of each claim against the owner of the building, and direct the house and interest of the employee in the lot to be sold." It was contended by the defendant that the statute contemplated only such buildings as are erected on, and permanently attached to, the realty. But the Court observed, that while it may not be doubted that the mind of the Legislature was directed to such buildings, that is not sufficient reason for saying that it was exclusively so. The present case was manifestly an exception, otherwise injustice would be done. The building, although not erected on the lot, was attached to it; and the employer had such an interest as might be sold on execution. The statute being remedial, should receive such a construction as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. Under the rule adopted in Indiana and Arkansas, every covered structure is either a building or a boat; and a boat, by being permanently attached to the land, for local habitation or the purposes of trade, becomes a building within the statute, provided it is in fact a place of shelter.

* Galbreath *v.* Davidson, 25 Ark., 490.

FIXTURES.

§ 78. **Fixtures.**—It may be stated as a general rule of law, that materials incorporated into a building in such a manner as to become fixtures, will subject the entire structure to a lien for the value thereof. If the lien is filed against the owner of the fee, the materials must become fixtures as between grantor and grantee; that is, permanently affixed to the realty.* But where a lessee is solely charged with the lien, it will extend to all erections or improvements made by him upon the demised premises, although he may have the right of removal during the continuance of his term. The lien extends to such a building, even when erected by a tenant, from year to year, or at will. Thus, when the lessee of an inn erected a ball-room resting upon stone posts slightly imbedded in the soil, and removable without injury to the inheritance, the Court of Appeals held that the ball-room being within the principle of erections made for the purposes of trade, removable by the tenant, was chargeable in a lien against such lessee, and the right of removal, upon a sale thereon, would pass to the purchaser.†

§ 79. **Is an Entire Structure a "Material?"—Machinery, etc.**—With the exception of the State Act, the right of lien extends only to the performance of labor or furnishing of materials for *building*, *altering*, or *repairing* a house or other building and its appurtenances; the question has often arisen under a similar provision in the statutes of other States, whether an

* Gray v. Holdship, 17 S. & R. (Pa.), 413; McGreary v. Osborne, 9 Cal., 119.

† Ombony v. Jones, 19 N. Y., 234.

entire structure, made and completed elsewhere, and moved upon the lot, or attached to the building, was a "material" within the statute. In Connecticut, under a clause giving the right of lien in case of "materials furnished and services rendered in the construction, erection, or repairs of any building," the court held that machinery furnished for fitting up a woolen-mill is not within the statute, although so attached as to become fixtures,* for the reason that it does not constitute an *erection*, *construction*, or *repair* of a building; but that if furnished at the time of the erection of the building, and as a part of the contract therefor, it would be an "erection" within the statute. The same rule would probably apply if the machinery was added to a building so erected, for if the machinery had become a part of the building by forming a portion of the original structure, it is difficult to see why a repair of the machinery would not be a repair of the building. Under this rule, the size or nature of the structure is not material, provided it is in a completed form at the time of its being placed in, or attached to, the building. Hence, no lien attaches for the equipment of a paper-mill previously erected, with fixed machinery, for the manufacture of paper, under a statute giving a lien to one who "shall build or repair, either in whole or in part, a house, *fixtures*, or *improvements*;"†

* See Massin *v.* Persse & Brooks' Paper-Works, 30 Conn., 474.

† E. T. Iron Manufacturing Co. *v.* Bynum, 3 Sneed, Tenn., 268; and see under the same law, in effect, Graves *v.* Pierce, 56 Mo., 423; Hanesler *v.* Mo. Glass Co., 52 Id., 452; and Summerville *v.* Wann, 37 Pa St., 182.

nor will it apply to the iron castings to be used in a manufactory building.* But in California, machinery furnished and used in a mill,† and in Maryland, machinery for a factory, and furnaces, when bricked into the cellar of a private house,‡ have been made the subjects of a mechanics' lien.

§ 81. **Same—Completed Buildings.**—This principle has been carried out in the case of entire buildings constructed elsewhere and sold and moved upon the premises of the contracting owner, for the reason that such structures cannot be considered as materials used in the erection or repair of buildings. Neither do they in any sense represent the result of labor in the erection of a building upon the premises in question. In Illinois this principle has been carried to such an extreme as to deprive the builder of the privilege of a lien upon either the lot upon which the building was erected by him or the one to which it was subsequently moved where the separate lots are owned by different persons; thus, where there were three adjoining lots in the same enclosure, two of which belonged to A, and the other to B; a carpenter erected for A a building on B's lot, which was subsequently moved to the lot belonging to A; it was held by the Court that a lien for the erection of the house would not attach to the building or either of the lots.§

§ 82. **Same.**—The foregoing rule in the case of buildings will only apply where they are sought to be

* Greenwood *v.* Tennessee Manufacturing Co.

† Donahue *v.* Cromartie, 21 Cal., 80.

‡ Weber *v.* Weatherby, 34 Md., 656.

§ Underhill *v.* Corwin, 15 Ill., 556.

charged as separate buildings. Where they are incorporated into the construction or repair of other buildings erected or being erected upon the land of the owner, they are "materials" within the statute. A contractor under a general contract for making certain additions and improvements to buildings, a part of which consisted in placing upon the premises a small house owned by the contractor to be used in connection with the other buildings, and upon which he was to make certain additions after it had been moved upon the premises in question, may acquire a lien for the entire amount due upon the contract, although the separate building was included therein at a separate price; the Court holding that although a lien will not ordinarily attach upon premises for a building already constructed to be sold and placed thereon, still if it is to constitute an addition to or a part of a larger structure, it may be regarded as materials used for that purpose. But where an unfinished building is moved upon the premises and completed thereon a lien will attach for the entire cost of the building. It is often difficult to decide whether the repairs made upon a building are sufficient to bring it within the above rule. Ordinary changes will only give a lien to the extent of the work thereon in its new position.* Nothing less than a completion of an unfinished structure, or such an overhauling as to make substantially a new building out of an old one, will give a lien upon the premises for the entire value of the building in such a case.

* Steigleman *v.* McBride, 17 Ill., 301.

OF THE APPURTENANCES.

§ 82. **The State Act of 1875** gives the right of lien to any person who shall hereafter perform any labor in erecting, altering, or repairing any house, building, or appurtenances to a house, building, "or building-lot, including fences, sidewalk, paving, wells, fountains, fish-ponds, fruit and ornamental trees, *and every improvement whatever to any such house, building, or building-lot*," the entire clause in parenthesis being an addition, and the portion in italics of particular effect in respect to one who furnishes completed articles to be affixed to the soil or buildings in question. Everything furnished for a building, or building-lot, which by becoming a fixture to it improves its value, will give the person furnishing the same a lien under this statute without regard to the mode or place of its construction. So, under the New York City Act of 1875, all improvements to *building-lots* are within the statute, but the law as to the building itself and its appurtenances remains as before.

§ 83. **Appurtenances.**—All labor and materials furnished upon a building or its *appurtenances* are chargeable in the lien. We have seen that the term "building" will include the structure, and everything so affixed to it at the time of its erection as to become what is known in the law as a fixture; but the term "appurtenances" is more indefinite in its signification. According to Jacobs,* it is used to "signify things both corporeal and incorporeal, appertaining to another thing as principal," and that "outhouses, yards, orchards, and gardens are appurtenant to a messuage."

* Jacobs' Law Dictionary, "Appurtenances."

Bouvier, in his Law Dictionary, adopts the definition given by the U. S. Supreme Court,* that it signifies, "things belonging to another thing as principal, and which passes as an incident to the principal thing." This includes the curtilege,† the right of way, watercourses,‡ and, generally, everything necessary to the enjoyment of a thing.§ *Taggart, J.* who delivered the opinion of the Court of Appeals in McDermot *v.* Palmer,‖ intimated that the term "appurtenances" as used in the Mechanics' Lien Acts would include the yard, sidewalk, and areas, and that work and labor performed thereon, or materials furnished therefor, are within the meaning of the statute. There are several reported cases in this State, where the lien was filed for flagging the sidewalk in front of the premises, and no objection was raised against the nature of the work.¶ But in Illinois, the courts under a similar clause restrict the lien for appurtenances to work done upon the premises to be charged thereby, and hold that no lien can attach for the construction of a vault under the sidewalk in front of the premises.** As we have seen, this question has not been directly passed upon in our courts, but should they adopt the Illinois rule, it would, in effect, cut off the right of lien for the construction or repair of drains, for while drains are undoubtedly "appurtenant" to the house or build-

* Donnelly & Libby, 10 Peters, 54.
† 2 Blackstone's Com., 17.
‡ Angell on Watercourses.
§ 4 Kent's Com., 478.
‖ 8 N. Y., 383.
¶ 1 Sweeny, 259.
* * Parmelee *v.* Hambleton, 19 Ill., 615.

ing for which they are constructed, but a small portion of the work is generally performed upon the lot benefited thereby. The New York City Act, and the State Act Amendment of 1875, have relieved the courts of much difficulty in this respect, by pointing out several things included in the term "Appurtenances," but this will not exclude other things under the principle of *exclusio unius*.

§ 84. When the Lien will not Attach—Public Buildings.—The rule that only the property of a municipal corporation which is not devoted to public use, can be levied upon and sold under execution, applies to judgments under the Mechanics' Lien Law, and prevents the enforcement of a lien upon property devoted to public use. The fair construction of the law allows a security to the mechanic in such a case, to be obtained if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise.* Thus a lien cannot be enforced against a public school-house.† Neither can a county be subjected by this process to the loss of its buildings, such as court-houses, public offices or jails, which are indispensable for the public benefit, accommodation, or safety,‡ or any other property shielded from private sale, on the grounds of public policy.§ This doctrine has been extended in some States, so far as to shield the property of all public corporations in which the public

* Brinckerhoff *v.* Board of Education of N. Y., 2 Daly, 443; S. C., 6 Abb. N. S., 428, and 37 How., 499.

† Id., Williams *v.* Controllers, 18 Pa., 275.

‡ Wilson *v.* Commissioners, 7 Watts & Serg., 197.

§ Foster *v.* Fowler, 60 Pa., 27.

have an interest, such as railroads,* and public bridges.† Section twenty-one of the New York City Act of 1875, contains a specific provision, that "Nothing contained in this act shall be construed to authorize the *filing of any claim* against any building or property used for public purposes," thus conforming the law to the decisions of the courts.

§ 85. **Same—Public Bridges.**—By the General Act of 1872,‡ the liens of mechanics and material-men have been extended to wharves, piers, bulkheads, and bridges; but will this permit a public bridge used by the people as a highway to be subjected to a sale under the statute? Such an act would be most detrimental to the rights of the people at large, and contrary to public policy. It would seem that the rule in relation to public buildings ought to apply in such a case. This construction would not render the statute nugatory, for it might still apply to private bridges. A public bridge is a common highway. A private bridge is similar in its nature to a private right of way, and is subject to most of its incidents. The character of a bridge depends more upon the use that is made of it than upon the means by which it was erected. If individuals make a public highway, the mode of remuneration authorized, as the right to take toll, will not deprive it of the character stamped upon it by the purposes to which it is applied. The right to erect a bridge, and to exact toll from passengers crossing it, is a franchise that can be granted only by

* Dunn & North Mo. R. R., 24 Mo., 493.

† McPheeters *v.* Merrimac Bridge Co., 28 Mo., 465.

‡ See Part III., "Statutes."

the State. That right is personal, and cannot be transferred without express authority of law. In conferring the privilege, regard is had to the ability of the applicant to build and keep up the bridge; and, as personal considerations may influence the grant, the franchise of common right is not transferable. The right of transfer in a corporation is confined solely to property.*

§ 86. **Same—Railroads, Canals, etc., under State Control.**—Although the statute is extended to all structures connected with railroads in this State, the same principle that protects public bridges would estop the mechanic from asserting a lien upon any public work owned or controlled by the State or municipal government. After a State has built a railroad at great expense, for the public use and convenience, it would be unreasonable to suppose a power remained in any individual to deprive the public of the benefit contemplated by it. Hence, work and labor performed upon, or materials furnished for the line of a public railroad, built under authority of the State for public use, will not subject it to a mechanics' lien.† This rule would protect the Erie Canal, and the structures connected therewith, from a statutory lien. But buildings erected in furtherance of a private enterprise may be subjected to a lien, although the purposes of their use is to a certain extent public, as for example, private canals, railroads,‡ bridges,§ and normal school build-

* McPheeters *v.* Merrimac Bridge Co., 28 Mo., 465.

† Dunn *v.* North Mo. R. R., 24 Mo., 493.

‡ Hill *v.* La Crosse, etc., R. R. Co., 11 Wis., 214.

§ McPheeters *v.* Merrimac Bridge Co., *supra.*

ings, not the property of the State.* But it has been held that the buildings of a corporation formed for the purpose of supplying a town with water and dedicated to that use, are protected from the liens of mechanics, on the ground of public policy.

§ 87. **Same—Rights of Sub-contractors.**—Guernsey, in his work on Mechanics' Liens,† commenting on the case of Brinckerhoff *v.* Board of Education, and its effect on the Law of 1863, says; "This lien was by a sub-contractor and under the law of 1851–55, and under it no personal action could be rendered against the owner in favor of a sub-contractor (citing cases). The object and effect of this statute is simply to take from the owner money actually owing by him upon his contract, and apply it in payment for the labor and materials which sub-contractors, or material-men, have contributed towards the performance of the same contract. * * * It would be proper, therefore, to hold now that a lien filed on public property exempt from sale on execution, would have the effect to transfer to the lienor any money due from the city on account of the contract, and give a general judgment therefor." This is simple justice and sound reason, although not applicable to the present act, as it prohibits the lien which must first attach in order to subrogate sub-contractors to the rights of contractors. The Supreme Court of Nebraska holds that a sub-contractor cannot enforce in the lien-action the personal liability of a municipal corporation to a contractor for work done

* Board of Education *v.* Greenebaum, 39 Ill., 610.

† § § 35-6-7.

upon a public building, for the reason that the contractor is not entitled to a lien in such a case, and that the sub-contractor cannot acquire a lien where the original contractor cannot, and the lien is necessary in order to connect him with the owner.* The only reason given by the courts, or existing in fact, for protecting public property from a mechanics' lien, is that a sale of it would be prejudicial to public interests, but this does not prevent the contractor from recovering judgment against a city in a personal action on his building contract, enforceable by execution against property not protected by public policy from the lien of an execution. Now, the effect of a lien being to transfer the personal liabilities of the owner to the claimant—a sub-contractor—there is no reason why he should not use this means for enforcing, like the contractor, a personal judgment against the corporation. The reason for the former rule being inapplicable, in such a case the rule itself should not apply. But if public policy should so far protect the administration of a municipality, as to shield it from suits in favor of third parties with whom it has had no dealings, it ought not to prevent the acquisition of a lien *upon the fund due the contractor*, and as to that fund be held, by virtue of the notice of the lien, as trustee for the benefit of the sub-contractor; and where personal liabilities may be enforced by the sub-contractor against the owner for the amount due by him to the contractor, and there is no statutory prohibition from filing a claim against public buildings,

* Ripley *v.* Gage County, 3 Neb., 397.

the rights of the sub-contractor would perhaps be protected in that manner.

§ 88. **The Application of Materials Furnished.**—Any one who "furnishes materials" for the construction of a building is entitled to a lien under all of our statutes. The strict letter of the law would be complied with by delivering the materials at or near the building for which they were furnished, whether or not such materials were actually used in its construction or repair. But on the other hand, the true theory of a mechanics' lien is repugnant to the idea that any property may be encumbered thereby, which has not been, in fact, benefited by the services or materials of the claimant. The benefit and the lien should be as inseparable as cause and effect. It is unfortunate that upon this point unison does not always exist between theory and practice, and that the practice of the different States is as irreconcilable as the theories of their respective courts; and this even though the several statutes are practically the same in this respect.

§ 89. **Same—Pennsylvania Rule.**—In Pennsylvania, under a law providing that "every dwelling-house shall be subject to the payment of the debts contracted for, or by reason of any materials *found or provided* by any lumber merchant for, or in the erecting and constructing such house," if a debt is contracted for, and on the credit of, a building, and the lumber delivered in pursuance thereof, a lien will be created, although the lumber is subsequently sold to other persons, and not used in the building.* The

* Presbyterian Church *v.* Allison, 10 Penn., 413; Wallace *v.* Melchior, 2 Browne, 104; Odd Fellows' Hall *v.* Masser, 24 Penn., 507; Singerly *v.* Doerr, 62 Penn., 9.

reason for this rule is briefly set forth in the case of Hinchman *v.* Graham, by* the Court, Tilghman, J., as follows: "I was once inclined to think that the lien might be restrained to the materials actually used in the building; but, on reflection, I find that such a construction is not warranted by the words of the law, and would operate unjustly on those who furnish the materials; for how can they tell the exact quantity that the building will require, or what control have they over the purchaser? * * The merchant having sold and delivered the materials, for the purpose of being used in the building, could do no more. It would be unjust, therefore, to throw upon him the risk of future application." But probably the true theory upon which this rule is established is that the materials furnished on the credit of a building and placed by it, becomes in the eye of the law a part of the building; and this without regard to the person at whose request it was furnished. Thus, in the case of White *v.* Miller,† the Court held that materials furnished under such circumstances to the contractor for the execution of a building, belong to the building and not the contractor, and are not liable to a levy in an execution against the latter. This necessarily follows from their standpoint upon this question, for if the lumber was furnished on the credit of the building, and not of the contractor, it is not easy to understand how it could be seized and sold by his creditors. The title to it was vested, by delivery, not in him, but in the proprietor of the building, subject only to the

* 2 S. & R., 170.

† 18 Penn., 54.

revindication of the seller. The ownership of it, between the time of delivery and of working it into the building, could not be in the contractor, because it was delivered to him, not on his own credit, but on the credit of the building to which it was destined. It was sold for the building, and, consequently, to the owner of it. He had power to protect it from the contractor's creditors, and he cannot charge his inactivity to the material-men, who had nothing to do with it. The ownership had passed by the delivery, and the building had become debtor for the price. The application of the lumber was to be seen to by the owner. The general principle upon which the Pennsylvania rule is founded is stated in the case of White *v.* Miller, to be that, as soon as owners of lots ceased to be their own builders, they put it in the power of the person employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the Legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor; the principle being held to be not only a just, but convenient one. Whether the builder be the agent of the owner or an independent contractor, his appointment to the work creates a confidence in him which was not had before; and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it, or to stipulate for security against

those that might afterwards turn up; and, if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he cannot charge the mechanic with the consequences of his own supineness.

§ 90. **Same.**—The Pennsylvania rule is followed in New Jersey,* Ohio,† Maryland,‡ Wisconsin,§ and Missouri.‖ It will be noted that the statutes in these States are all the same in effect as those of New York State; thus, in Maryland, the term "shall extend to all work done and materials furnished" is used. In Ohio it reads, "any person who shall furnish materials for erecting and repairing any house, in pursuance of an agreement with the owner." Wisconsin, like Pennsylvania, uses the term "work done and materials found." New Jersey adopts the phrase "labor performed and materials furnished;" and in Missouri, "every mechanic or other person furnishing work or materials for buildings," is entitled to a lien. Under these provisions, all that the claimants in the above States have to show, is the fact that the materials were furnished for the use of the building; upon the theory that it would be altogether unreasonable to require the material-man to follow his materials to the building, and to make positive proof of the fact that they were actually used for the purposes for which they

* Morris County Bank *v.* Rockaway Manufacturing Co., 1 McCarter Ch., 189.

† Beckel *v.* Petticrew, 6 Ohio St., 247

‡ Greenway *v.* Turner, 4 Md., 296.

§ Esslinger *v.* Huebner, 22 Wis., 632.

‖ Morrison *v.* Hancock, 40 Mo., 561.

were alleged to have been purchased. Such a requirement is considered not only extremely inconvenient but entirely impracticable.*

§ **91. Same—The Delivery.**—As we have seen, the sale *for* and the delivery *at* a building completes the right of lien, under the Pennsylvania rule. The contract of sale has been considered in Chapter III. Although the term generally employed by the courts as to the delivery, is a "delivery at or near the building," that is only necessary where the material-man is required by the terms of the sale to make such a delivery. A delivery at a wharf or railroad depot, or at any other place, for shipment to the building, that may be specified and agreed upon between the parties is sufficient, as it is under the contract a complete delivery *for* the building. The delivery at one place or another is only important as an evidence of the purpose for which materials are sold. Where gross materials have to be worked up into articles suitable for the building, and which cannot conveniently be done upon the premises, it would be useless to require the materials to be first delivered at or near the building and then subsequently moved to a manufacturer's.†

§ **92. Exceptions to the Rule.**—There are two exceptions to the Pennsylvania rule; the first is in the case of fraud. Of course, unappropriated materials contracted for a building through collusion with the material-man, and never in fact intended to have been placed upon the property in question, will not be allowed to charge

* Morrison *v.* Hancock, 40 Mo., 561.

† Hinchman *v.* Graham, 2 S. & R., 170.

the fund that should be applied to the payment of bona fide lienors. Fraud is an exception to every rule, that is, it works the destruction of every claim founded upon it. The second exception relates to the character of the materials. The owner should be supposed to know just the kind of material to order for the construction of his building, and in ordinary cases a lien will attach if the material called for is not adapted to the particular use designed for it; but as an evidence of good faith on the part of the material-man the materials furnished by him ought to be of the kind that would induce a careful, prudent, and skillful man, acquainted with the building, to believe that they could be usefully employed in its erection, and where they are entirely useless because of a character totally unadapted to the building no lien will arise.*

§ 93. **The Illinois Rule.**—A different rule is established in Illinois, which is briefly thus expressed: Two things must concur to give the lien; 1st, The contract, which may be express or implied; and 2d, The furnishing of the materials *actually used.* Under this rule it is not the contract, or the actual furnishing of the materials in pursuance therewith which creates the lien, but the *use* of the materials so furnished, and this seems to be the only equitable rule if the rights of third parties are to be regarded. Thus, under their statute giving a lien to "any person who shall by contract with the owner of any piece of land, *furnish labor or materials* for erecting any building" thereon, the Court held that the Legislature only in-

* Odd Fellows' Hall *v.* Masser, 24 Penn., 507.

tended to give this lien for the materials actually used in, or the labor really bestowed upon the building situated upon the premises against which the lien is sought to be established; for the reason that otherwise the claimant would secure a lien, not for anything he has done to enhance the value of the building, nor by reason of any encumbrance upon it, but because the owner of the premises had purchased lumber for the purpose of using it on the premises, but which he never did so use. The very essence of the lien created by this statute is the furnishing the materials of which the building is constructed. It continues in the party furnishing the materials of which the building is erected, *a quasi* property in those materials, and others with which it has been commingled in the building, and allows him to follow it, thus transformed, for the purpose of getting his pay. If the materials be furnished for the purpose of being put upon lot one, and they are placed in a building upon lot two, the lien is on the last lot, where they were actually used, and not on the first. There is no lien on the premises till the material is put upon them. Any other construction would allow a lien, if a man go to Chicago and buy lumber to build a house on a particular lot in Chillicothe, and *in transitu* the lumber is burned up. Such is not the intention or true construction of the law.* This rule is followed in California under a statute providing for a lien in favor of any person "performing labor or furnishing materials for the

* Hunter *v.* Blanchard, 18 Ill., 318.

construction or repair of any wharf or building,"* and in Connecticut under a similar statute,† and in Massachusetts,‡ Iowa,§ and Maine.‖ The principle embraced in these decisions is founded in natural justice, that the party who has enhanced the value of the property by incorporating therein his labor or materials, shall have security in the same, though changed in form and inseparable from the property. But justice does not require that he should be allowed the security in the same property for the price of materials which became no part thereof. To allow a lien for materials sold by one party to another under the representation that they would be wrought into a building, but which were not, may deprive others who provide materials which are actually used from an effective lien upon the same property.

§ **94. The True Rule** in my opinion is, that all persons dealing with the owner, may as to him secure a lien for materials sold on the credit of a building, whether or not they are so applied by him. But persons furnishing materials to any person other than the owner or his agent, must, in order to charge the interest of the owner, show that such materials have actually entered into the performance of some improvement, erection, or repair of his property authorized

* Houghton *v.* Blake, 5 Cal., 240; Bottomly *v.* Grace Church, 2 Id., 90.

† Chapin *v.* Persse & Brooks' Paper Mill, 30 Conn., 461.

‡ Rogers *v.* Currier, 13 Gray, 129.

§ Cotes *v.* Shorey, 8 Iowa, 419.

‖ Lombard *v.* Pike, 33 Me., 241; Perkins *v.* Pike, 42 Id., 141; Taggart *v.* Buckmore, Id., 77.

by him to be made, and that in all cases, lien claimants whose materials have actually been used upon the property to be charged, will take precedence over those where such application has not been had. The owner will be estopped from pleading that materials purchased by him on the credit of a building, have not been applied to the use intended at the time of the purchase, for the purpose of defeating a lien on the part of the material-man. But the principle of estoppel, so plainly applicable in such a case, will not apply where a contractor, without any collusion between himself and the owner, procures material on the credit of the building, and uses it elsewhere. To allow a lien in such a case, would subject the owner to a double charge for the same article, as he would undoubtedly be liable to a lien in favor of the persons whose materials were actually used in their place. To avoid any possible loss in such a case, material-men, when dealing with irresponsible contractors, entirely on the credit of the building, should see that the materials furnished by them enter into its construction, so as to become a charge against the owner.

§ 95. **In New York State** the courts have not passed upon this question under the Mechanics' Lien Acts; for this reason I have given considerable space to the reasoning of the courts in their support of the two rules so diametrically opposed to each other. I have no doubt, however, that the Illinois system will be adopted by us, at least so far as the same is followed in the rule I have laid down in the preceding section. The General Term of the Court of Common Pleas considered the question

in its application to liens upon ships* for materials "furnished for or towards building a ship," in the case of Phillips *v.* Wright,† in which the Court, *per* Sandford, J. says: The evidence fully sustains the fact that the timber was furnished for this particular ship, and charged to Bishop & Simonson, (the contractors). * * * But it appears also, and so the referee states, that a part of the timber so furnished was not used in the vessel. Some of it was sold by the contractors, and it is probable that some of it went for the repair of other vessels. The plaintiff insists that the non-application of the timber to the building of the vessel for which it was bought, is immaterial; that the statute confers the lien when it is sold and delivered for building the vessel, without regard to its application for that purpose. We do not think that this position is a sound one. The whole theory of a lien for labor and materials rests upon the basis, that such labor and materials have entered into, and contributed to the production or equipment of the thing upon which the lien is impressed. This imposes upon the material-man the necessity of seeing to it, that his materials are applied to the purpose for which they are procured, if he design to rely upon a lien given to him by reason of such purpose. The laborer makes the application himself, and hence the difficulty does not extend to his case. If the law were as the plaintiff contends, it would produce inextricable confusion. A ship builder in doubtful credit would buy lumber and materials sufficient for building a ship, from several distinct per-

* 2 R. S., 493.

† 5 Sandford R., 360.

sons, he would buy them for a particular ship designated, and each material-man would sell to him "for or towards the building" of that ship. He would sell some of the materials thus acquired and use some in building or repairing other ships. Which of these material-men is to have a lien? Or are all entitled to a lien amounting in the aggregate to several times the value of the materials which actually entered into the construction of the ship, thus probably totally displacing or reducing to a small proportion the lien of laborers, sail makers, etc., whose work or supplies were used in the building of the ship? It is very apparent that such an interpretation of the statute would lead to its complete defeat, as far as any praiseworthy object is to be effected by it. It may well be doubted whether a literal interpretation of the words of the statute* confer a lien unless the articles furnished are actually used in the building, etc. of the vessel against which it is claimed. Can it be said that materials *for or towards building* a ship, when no part of them enter into or become part of the ship? They may be furnished *for the purpose of* being thus applied, but is that the same as being furnished *for the ship?* In other words, does not the idea of furnishing an article for, or towards, the building of a ship, embrace as well its application to, or in the ship, as its procurement for that object? I may buy an article of furniture, for the purposes of my library, and with a full intention of placing it there, and then change my mind, and sell it to another. Can it be said that such article was bought for

* 2 R. S., 493.

or towards furnishing my library? This interpretation of the statute imposes no undue hardship upon material-men. The act gives them a privilege over all general creditors, on the footing that the articles furnished by them have contributed to the making of the ship against which it is claimed. It is certainly not asking too much that they shall look to the application of what they furnish, if they intend to create the statutory lien. The reasoning of the court in this case favors the full Illinois rule, but its findings were limited to the case of materials furnished to the builder and not to the owner. I am still of the opinion that the Pennsylvania rule should apply as against the owner, for materials furnished to him direct on the credit of the property on which the lien is sought.

§ 95*a*. **Manufactured out of the State.**—The lien law has no extra territorial force, and will not cover materials such as machinery manufactured out of the State for use in a building within the State, although it is so applied to the premises as to become a fixture, and entitle the claimant under other circumstances to the benefit of the statute. Birmingham Iron Foundry Co. *v.* Glen Cove Starch Manuf. Co., 78 N. Y., 30.

ELEMENTS OF A LIEN.

CHAPTER V.

OF THE PROPERTY CHARGEABLE THEREWITH.

§ 96. We have considered the parties to the lien, the contract, and the work and materials rendered under it. The only remaining element that enters into the generation of a lien is the property upon which it is a claim or charge. Under some statutes the notice is necessary to the legal existence, and may properly be deemed an element of a lien, but as it is deemed desirable to treat the acquisition and enforcement of a lien together, the notice of a lien will be considered hereafter. In respect to the property chargeable with a lien, it may be said that the specific building or structure into the composition of which the mechanic's claim has entered, is primarily chargeable. We have in the preceding chapter considered this branch of the subject, in connection with the work performed or materials furnished thereon. But the lien, under the several acts in this State, is a charge not only upon the building or structure upon which the work or material is applied, but also upon the lot or parcel of land upon which the same stands, and which is appurtenant thereto and secondarily liable. It is often difficult to determine how much land in area is so appurtenant to the building or other struc-

ture as to be covered by the lien. It may be stated as a general rule that the lien may cover so much of the tract of land on which the building is erected, as is necessary for the full and complete enjoyment of the structure for the purposes to which it is used.*

§ 97. **The Lot.**—The term generally used in this State to designate the area of land to be covered by a lien, is the "*lot* on which the same stands." Now, a "lot" is a very indefinite quantity. Its proper meaning when applied to real estate is a portion of land that has been separated from other lands, by survey, allotment, or usage, but in common parlance it means simply a piece or parcel of land without regard to size, such as a town lot, a wood lot, or a mill lot.† But within the meaning of the statute, it denotes one single parcel lying together, known as one tract, bought and sold as such, its metes and bounds generally known and accepted, as being the tract, lot, or parcel of land which the parties naturally understood as that which would appertain to or be connected with the building or buildings after they should be erected.‡ It is the known and not the unknown boundaries that limit the area of ground. It is not necessarily the particular lot upon which the building is erected as marked out and designated on some map or town plat, but the actual enclosure connected therewith, whether it con-

* Nelson *v.* Campbell, 28 Penn., 156; Derrickson *v.* Edwards, 5 Dutcher (N. J.), 468; Roby *v.* Corporation of University of Vermont, 36 Vt., 564.

† Houck's Lien Law, page 181.

‡ Bank of Charleston *v.* Curtiss, 18 Conn., 342.

tains one or more of such lots. Thus, where the lien is for work performed upon a mill, it will extend to the entire yard or millway connected with the mill, and all other contiguous land used, and necessary to be used, in working the same to advantage.* So where two or more adjacent lots are used without any actual division between them as one mill lot, a part of the buildings and machinery being upon one and a part upon the other, the lien extends to both lots, though the precise spot where the work was done may be entirely within the limits of one of them.† This rule will apply whenever two or more town or city lots are thrown into one plot and used for a common purpose, whatever that purpose may be; the ideal division lines being disregarded in such a case.‡

§ 98. **Must be a Territorial Rule.**—The courts will not in this State impair the security of a lien by limiting the sale under foreclosure to any particular portion of the premises covered by it, unless upon a state of facts establishing a high degree of equity on the part of the owner. But the courts of New York will hardly follow the rule adopted in New Jersey;§ that the claimant may include in his lien enough land which, together with the house, will be sufficient to discharge and satisfy it in full; as this makes in all cases a pecuniary and not a territorial rule of limitations.

§ 99. **City Lots.**—Less difficulty arises in cities than in small towns in this respect; since in the former

* Findlay *v.* Roberts, 19 Ga., 163.

† Choteau *v.* Thompson, 2 Ohio, 114.

‡ Id.

§ Vandyne *v.* Van Ness, 1 Halstead Ch., 485.

case the lien will almost invariably cover a lot of land made up of one or more ordinary city lots that are contained in the same enclosure with such building, and to be used in connection therewith. The line of demarkation in such a case is boldly drawn. Generally, the walls of an adjoining building or a surrounding fence will designate and fix the area of land that is appurtenant to the house and chargeable with the lien.

§ **100. Where there are several buildings** on the same plot of ground and they are so unconnected with each other, that each may be sold separately without injury to the others, a mechanic cannot, for work done upon one of the buildings, subject the entire parcel of ground and all the buildings thereon, to a lien. The portion of land taken up by the other buildings not being in any sense *appurtenant* to the building in question, are not chargeable with its debts. But on the contrary, where work is done for one of several buildings used together and depending upon each other for the purposes of trade, manufacture, or residence, the lien will extend to the entire plot of ground, and all the buildings thereon, for in such a case the work done to each one increases the value of the entire class of buildings connected with it. Thus, a claim filed upon a building, fronting on a back street, but connected with and forming the rear portion of a large hotel facing on the front street, is a charge upon the entire property.* So each of all the buildings erected as one tenement and its appurtenances is liable for the

* Field *v.* Oberteuffer, 2 Phila., 271; Trustees, etc., *v.* Young, 2 Duvall (Ky.), 586.

work done on the others.* This rule does not make it necessary that the lien for every sort of a building shall cover all the land on a portion of which it is erected. It may be a mill, or one of several barns on a very large tract of land, or a factory or warehouse on one side of it, capable of separation from the main tract without injury to it. Although each building in such a case can only attach to it land sufficient for its own purpose, it creates no argument against the connecting together under one lien all adjoining buildings necessary to each other.

§ **101. Same—the only objection** to the entire lien in such a case is the extension of it to property on which the mechanic or material-man has expended nothing. But this is allowed by the law when it is extended to any ground not covered by the building. It is extended to the marble mason, who puts up the front without touching the back of the building. Where the ground and the several houses erected upon it are designed for a united enjoyment, the law treats them as a unit in relation to the liens which it gives. Upon this principle liens are given upon whole lots and all their improvements, when streets are opened and paved for the common benefit, even though the lots may extend back to other streets; and so in Holland and other countries where liens are given for the repair of dykes to shut out the ocean, and ditches to drain the country; they are liens on all the properties receiving the benefit, whether they adjoin the work or not.†

* Nelson *v.* Campbell, 28 Penn., 156.

† Nelson *v.* Campbell, Id.

§ 102. Same—The Wisconsin Rule.—This principle has been so extended in Wisconsin as to charge the area of ground *intended* to be covered by several buildings to be used for a common purpose, although but one or more of them are in fact erected thereon; thus, where a builder contracted to erect certain depot buildings for a railroad company on a block of land owned by them in the city of Milwaukee, to be built in sections and paid for as the work progressed, and after one section was constructed, the company failed to make its payments, the Court held that a lien would attach upon the entire block, to the extent of one acre (the limit of the statute), for the balance remaining due to the contractor, although such block was composed of several distinct city lots.*

§ 103. Work done for the Common Benefit of Separate Buildings.—Where the claim accrues for work upon a structure that is appurtenant to, and necessary for the use of, two or more distinct buildings, it will extend the right of lien to them all, although the buildings themselves have no connection with each other; thus, where a stack is erected for the common benefit of a pork-house and a distillery, the mechanic may have a lien on both establishments.†

§ 104. Where Several Buildings are erected under a single Contract, the builder may, unless prohibited by statute, file a single lien upon the entire property, and the entire debt will become a charge upon each

* Hill *v.* La Crosse and Milwaukee R. R. Co., 11 Wis., 214.

† Bodley *v.* Denmead, 1 W. Va., 249.

and all of the buildings.* But it has been held, where the work was performed under such circumstances, equally upon each of seven adjacent houses, one of which was transferred before the notice of lien was filed, that the lien was a valid charge upon the remaining six houses only for their proportionate part of the whole claim (six-sevenths), although some payments had been made by the owner on general account.† A single lien should be filed upon a dwelling-house, barn, and outhouses, all erected under one contract.‡ So it seems a single lien will attach for the aggregate cost of building a dwelling-house and barn, although erected under separate contracts, the one in parol the other in writing.§ So under the New York City Act of 1830, the Court of Appeals of this State held that where the builder contracted with several persons jointly for the erection of separate houses upon lots owned by them separately, that they will be held jointly liable for the entire work, and a single lien may be filed upon the several buildings for the aggregate amount due under the entire contract.‖

§ **105. Same—Where the Contract is not Entire** and the amount furnished to each building can be estimated, separate liens must be filed, even though all

* Paine *v.* Bonney, 4 E. D. Smith, 734; Livingston *v.* Miller, 16 Abb., 371. *Sed contra* Butler *v.* Rivers, 4 R. I., 38.

† McAuley *v.* Mildrum, 1 Daly, 396.

‡ Bank of Charleston *v.* Curtis, 18 Conn., 342. But the building must be contiguous. Campbell *v.* Furness, 1 Phila., 372. Chambers *v.* Yarnall, 15 Pa., 265.

§ Chapin *v.* Persse, 30 Id., 461.

‖ Mandeville *v.* Reed, 13 Abb., 173; *sed contra* Rathbun *v.* Hayford, 5 Allen, 406; Davis *v.* Farr, 1 Harris, 167.

of the buildings belong to the same owner. Thus, where a lumber dealer sold lumber for three paper mills belonging to the same person, two of which stood upon one lot, and the other upon a separate lot, keeping distinct account of the lumber furnished to each building, and then filed a single lien for the general balance upon all the buildings, the Court declared the lien to be absolutely void, both in respect to the description of the premises, and the amount of the lien.* And the same principle has been followed in Illinois.† So, where the owner occupied several buildings as a factory, on some only of which materials were furnished, the Court held that the lien would only cover the specific buildings benefited thereby for the value of the materials furnished to each respectively, although all the buildings were situated on the same plot of ground, and used for the same general purpose.‡ So a single lien cannot be filed upon a block of buildings for the general balance due upon the separate contract for the construction of each house.§ Nor can a single lien be filed upon two sections of a canal for the amount due on account of the separate contracts for the repair of each section.

§ 106. **Same—The New York City Act** of 1875, provides that, whenever "one claim is filed against

* Chapin *v.* Persse, 30 Conn., 466; Goepp *v.* Garliser, 35 Pa., 130.

† James *v.* Hambleton, 42 Ill., 308; Strigleman *v.* McBride, 17 Id., 300.

‡ Dallas L. & M. Co. *v.* Wasco Woolen Mills Co., 3 Oregon, 527.

§ Landers *v.* Dexter, 106 Mass., 531.

two or more buildings, or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings or other improvements, otherwise the lien of such claim shall be postponed to other liens." This provision is only inserted to regulate the amount of incumbrance on each building, as between the lienor and other encumbrancers. As between the claimant and the owner, the ordinary principles respecting liens upon several buildings remain unchanged.

§ **107. The Extent of Land to be Covered by the Notice.**—We have seen that in New Jersey the courts have held that the claimant may extend his lien over a sufficient area of land to satisfy and discharge it. Although this may not be followed here in full, it is not without its support in theory and in practical common sense. Where other buildings are not affected thereby, no serious difficulty can grow out of including in the lien-claim more land than is actually necessary to satisfy the debt, and a larger plot of ground than is strictly appurtenant to the buildings thereon, as buildings, provided it is all in one lot or parcel of ground. The law certainly intends, if there is land enough in the lot to cover the amount of the lien, that it shall all be included therein; as it is a statutory provision, intending where possible to give a *full security* to the mechanics and material-men, who improve the entire property by the erection of buildings thereon. Who can tell under the circumstances how much this will require? And why should the contractor, when there is land enough to secure his claim, and which is

clearly subjected to it, be compelled to abridge the quantity and thereby lose a portion of his lien? It does not follow because a lien is on a large tract that it must of necessity all be sold. The mechanics' lien is just like any other lien, all that is necessary to do is to sell enough to pay the claim. A mortgage or ordinary judgment is a lien, but in enforcing either of them by sale, the sheriff or other officer can be, and generally is, restricted to the sale of so much only as is necessary to pay the debt; and, whether at law or in equity, there is but little difficulty in adjusting rival liens; and the statutes or decrees under which these proceedings take place, usually expressly direct the sheriff or other officer having execution or *levari facias*, to advertise, and sell, and convey the buildings and the land in the same manner as directed by law in case of land levied upon for debt.*

§ 108. **Same—Will an over Statement destroy the Lien?**—It follows from the preceding remarks that the lien may cover an area of ground more than sufficient to satisfy the debt, and that in such a case the sale under foreclosure may be of a less area than that contained in the lien. As the extent of land cannot be increased after the notice is filed, the claimant should file a lien upon enough ground in connection with the buildings to amply secure his claim, even though it covers more ground than the strict letter of the statute allows. Suppose it be true, that the plaintiffs in filing their lien claim, have embraced in it more land than, by a reasonable consideration of the act, they would be en-

* Vandyne *v.* Van Ness, 1 Halstead, Ch., 491.

titled to, does this absolutely destroy all their right of a lien in every part of it, buildings and all? If this be so, the Lien Law rests on a very uncertain basis. It is, in fact, rather a trap than a security for a just debt; for as we have no way whatever for ascertaining the precise amount of land which a court or jury might happen to think should go with the building, and be affected by the lien, if the claimant, from this or any other cause, should be so unfortunate as to make his claim a little too large, although no one could by possibility be injured by it, his whole lien claim is absolutely not good, notwithstanding the claimant furnished his labor and materials, to the amount of thousands, on the faith of the very lien alone, but which, in consequence of the mistake, he is actually deprived of, and his claim wholly lost. Such a construction of the statute neither sounds in equity, logic, or law.* My advice would be that where a large tract of land is connected with the building erected thereon, and the security at the best is inadequate or doubtful, the notice should be filed upon the entire tract. The metes and bounds of such lot or tract being known and established, the Court might well hold that in erecting the building credit was given by the mechanics and material on the strength of a lien upon the building and the land to the extent of the lot as it then stood. Such a lot being distinct from other lots or tracts, and within the intention of the parties, the claimant may well include it in his lien, and not be forced to cause a new survey to be made within narrower limits which no one recog-

* See Derrickson *v.* Edwards, 5 Dutcher (N. J.), 468.

nizes, and thus to carve out a new artificial lot for the express purpose of conforming with a statute only enforceable in an equitable proceeding. But if the Court should hold that the area of ground was too extensive, it may decree the sale of a less quantity without invalidating the entire lien.

§ 109. **The State Act—As Amended in 1873 and 1875,** extends the right of lien to the lot or *farm* of land upon which the statutory improvements are made, while the adoption of the word "farm" may not receive a literal construction, so as to charge an extensive farm of two hundred or five hundred acres, especially where the building is constructed as a country residence, and not for farming purposes. Still, it undoubtedly enlarges the provisions of the original act, as an additional term, included in an amendment, must be construed as giving the original act an additional force or meaning. We can readily see that a building may be erected upon a large tract of land, at such an expense, and under such circumstances, that its value depends mainly upon the increased value of the land, and that if sold separately, it would not pay half the cost of its erection. In such a case, under the State Act, I think the lien would extend to sufficient land actually improved in value by the erection of the building, to, in connection with the building itself, pay all demands arising from its construction. If the land is poor, or distant from markets or railroads, it may take a large quantity of it to pay the claim, and it would be unreasonable and impolitic to apply to it a territorial rule of construction applicable solely to lands of great market value. Neither should

the claimant be compelled before he can possibly know what the result of the sale will be, to limit his security in such a case to a plot of five, ten, or even fifty acres of the same lot, tract, or farm of land.

§ 110. **Leasehold Property.**—From the very nature of the relation of the parties, a different rule must be adopted whenever the interest of a lessee is solely chargeable with a lien. As the sale in such a case places the purchaser in the position of the original tenant, the lien must cover all the lands named in the lease. In other words, it is a lien on the *lease*, and the rights of the lessee under it. As the leasehold contract is entire, neither the property leased, nor the rent reserved, is severable without the consent of the lessor, and one must take under an assignment the entire premises covered by the lease.

§ 110*a*. **Materials furnished under an entire Contract for separate unconnected Houses.**—The lien laws do not so abrogate the laws of contracts as to give a lien upon one of several buildings owned by different parties for labor and materials furnished for them all under an entire contract, for the actual value of the labor furnished that particular house.*

* Childs *v.* Anderson, 128 Mass., 128; Foster *v.* Cox, 123 id., 45; Stevens *v.* Lincoln, 114 Mass., 476; McGuinness *v.* Boyle, 123 id., 570.

DEFENSES TO A LIEN.

CHAPTER VI.

PAYMENT.

§ **111.** Perhaps the natural treatment of this subject would place the consideration of the acquisition of a lien prior to that of the defenses to a lien; since it must be acquired before it can be defended. We follow the inverse order for the reason that the requirements of, and the defenses to a lien being first understood, its acquisition and enforcement is comparatively easy and simple.

§ **112. Payment** made in good faith to a contractor on account of the building upon which a lien is sought, is, *pro tanto*, an absolute defense. Neither the owner nor his property is liable unless it appears that a payment is due the contractor from him.* It follows, therefore, that if the contract price has been fully paid to the contractor according to its terms, the owner cannot be made liable to any claimant whose right of lien rests solely on the terms of such contract.† The de-

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* Carman *v.* McIncrow, 13 N. Y., 70; Loonie *v.* Hogan, 9 Id., 435; Doughty *v.* Devlin, 1 E. D. Smith, 625; Spaulding *v.* King, 1 Id., 717.

† Pike *v.* Irwin, 1 Sand., 14; Thompson *v.* Yates, 28 How., 142; Randolph *v.* Garvey, 10 Abb., 179.

fense of payment may be set up against the claim of a sub-contractor, although it was made to the contractor before it became due under the terms of the contract, provided it was made in good faith.* But a payment made by collusion between the owner and contractor for the purpose of defeating the design and intent of the statute, or made before maturity, for the purpose of defrauding the sub-contractor or other lien claimants, will be disallowed, and lienors may recover the same as if it had never been made.† In the absence of collusion, there is no reason why an owner shall not make an advance payment. A party to a contract may waive any or all of its provisions intended solely for his benefit and protection, without affecting its validity as to the other provisions. An owner of property erecting houses or making permanent improvements, should not be required to ascertain how many employees the contractor may have, or how much money may be due them, before he can venture to discharge his own obligations. He may pay the full amount of the contract to the contractor at any time, provided other claimants have not already perfected their right of subrogation by the notice required by the statute.‡

§ **113. Payments after Notice.** — Although payments in good faith at any time before the filing of a notice of lien will be binding upon all the parties, pay-

* Carroll *v.* Coughlin, 7 Abb. (N. S.), 72; Schneider *v.* Hobein, 41 How., 232.

† Lynch *v.* Cashman, 3 E. D. Smith, 660; Smith *v.* Coe, 2 Hilton, 364; Quimby *v.* Sloan, 2 E. D. Smith, 594.

‡ See Prescott *v.* Maxwell, 48 Ill., 82; Spaulding *v.* Thompson, etc., 27 Conn., 573.

ments made after notice will not protect the owner from the rights of the lienor acquired at the time of the filing. The claimant then acquires a valid lien upon the premises for the value of his services or materials, to the extent of the amount *then* due from the owner, and payment to affect his rights must be made to him.* It is not necessary that the owner should have *actual notice;* all the claimant is required to do, is to file his claim. That is constructive notice to all parties. The owner must, before making payments to the contractor, ascertain whether any liens are filed, if he desires to protect himself against the statute. Having neglected to do so, he pays the contractor at his own peril.†

§ 114. **Appropriation of Payments.—1. By act of the Parties.—The Debtor.**—Primarily the right of appropriation belongs to the debtor. He has the control over his own funds and may apply them to what purposes soever he pleases. If he owes two persons, he may of course elect which to pay. So also, if he owes one person on two separate accounts, he may elect which account he shall first reduce or discharge. This principle is founded in the Civil Law, and being fully charged with reason and common sense, is recognized and adopted both in America, and modern Continental Europe. If, therefore, the creditor accepts a payment specifically made upon a certain account, he is bound to the conditions which the debtor has appointed, even though at the time he refused to admit them.

* Blauvelt *v.* Woodworth, 31 N. Y., 285; Schneider *v.* Hobein, 41 How. Pr., 232; McBurney *v.* Bradbury, 6 La. An., 39.

† Smith *v.* Coe, 2 Hilt., 364; Aff., 29 N. Y., 666.

§ 117. **The Creditor's Right of Application.**—Where the application is not made by the debtor *at the time of payment*, the right of election is vested in the creditor. The control of the fund which gave the right of appropriation having passed to the creditor, the right of appropriation passes with it. Thus, where the claimants held both a lien claim and an unsecured book account against the owner, the Court held that they were entitled to apply a general payment to the book account in preference to the prior claim secured by the lien, and that their books of original entries were evidence as to the application made at the time of payment.*

§ 116. **Of the time when the Application may be Made.**—In the case of The United States *v.* Kirkpatrick 9 Wheat., 737; Justice Story in delivering the opinion of the Court says; "it is too late for either party to claim a right to make an appropriation of the payment, after the controversy has arisen." Although the same Court intimated in a previous case,† that no restriction existed on the power of the creditor to make the payment at any time he pleased, the Court of Appeals of Virginia held that the creditor was bound to make the appropriation soon after the payment was received.‡ And the Supreme Court of this State, in the case of Allen *v.* Culver,§ expressed an opinion that the creditor is not bound to make the application im-

* McQuaide *v.* Stewart, 48 Penn., 198; Waterman *v.* Younger, 49 Mo., 413.

† Mayor of Alexandria *v.* Patten, 4 Cranch, 320.

‡ Hill *v.* Southerland, 1 Wash. R., 128.

§ 3 Den., 284.

mediately, but may make it within a reasonable time.* What amounts to a reasonable time, depends upon the peculiar circumstances of each case. Ordinarily the right of election will continue as long as the condition of the several claims and the rights of all parties in connection therewith remains in the position occupied at the time the payment was made. The trial of a cause, and probably the commencement of legal proceedings affecting the claims, will terminate the right of election by the creditor.† And where a payment was made—without an actual appropriation at the time by either of the parties—to the owner, against several of whose buildings the contractor held distinct liens, and the claimant, after suffering one of the liens to expire, through neglect, strove upon the trial to apply the entire payment to claims covered by the void liens, and thereby enforce the full amount of the lien existing against one of the buildings held by an innocent third party, the Court held that even if the application was equitable the claimant was too late to make it.‡ But in the case of Marsh *v.* Oneida Central Bank,§ the Supreme Court of this State held, that a bank holding a note against one of its depositors is not bound to make the application of a deposit to the note upon its maturity. It may wait until a judgment is recovered thereon, and then assert the right even as against a third party who received an assignment

* See also to the same effect Pattison *v.* Hull, 9 Cow., 747.

† See Harker *v.* Conrad, 12 S. & R., 301.

‡ Harker *v.* Conrad, Id.

§ 34 Barb., 498.

of the deposit after judgment was entered on the note.

§ **117. As to the manner of signifying the Application.**—It is not necessary in all cases that the intended application should be made by either the debtor or the creditor in express terms, it may be implied from circumstances. Thus, where the debtor makes a payment exactly equaling only one of the debts in amount * it must be inferred as having been intended for that particular claim; and so a creditor, by crediting payments generally upon an open account, implies an intention on his part to apply them to the items in order of time, even though he has security for the earlier items, but not for the others.† So the application may be inferred on the part of the creditor in certain cases, from his giving special or general credits upon one or more of the claims.‡

§ **118. As to what Claims the Creditor is precluded from applying General Payments.**—The debtor may apply payments to any debt. His right of election is absolute, but that of the creditor is limited. The choice of the latter being in contravention of the civil law, is restricted in range to a strictly equitable selection. A creditor cannot make an inequitable application of payments.§ It is not competent, therefore, for a creditor holding an existing debt to apply a general payment to the discharge of a contingent liability he may have assumed for the debtor, such as

* Robert *v.* Garnie, 3 Cai., 14.

† Truscott *v.* King, 6 N. Y., 147.

‡ Allen *v.* Culver, 3 Den., 284.

§ Beidenbecker *v.* Lowell, 32 Barb., 9.

the unmatured note of the debtor on which he is an indorser.* Nor can he apply it to any future liability to the prejudice of a past due claim.† Nor can a surety exonerate himself by applying money which his principal, being a debtor to him on a different account, may have advanced, although without any particular direction.‡ But the creditor may apply a payment to an unsecured as against a guaranteed debt,§ and to a several in preference to a joint liability.‖

§ 119. **2. Appropriation by Act of Law.**—Where the parties fail to make a specific application of payments within the time allowed to them under the foregoing section, then the Court makes the application for them. The general principle adopted by the American Courts, where the payment is thus left to be appropriated by law, is to apply it according to the intrinsic justice and equity of the case.¶ "The true principle," says Chancellor Walworth, in the case of Stone *v.* Seymour,** "unquestionably, is that stated by Chief Justice Marshall in Field *v.* Holland (6 Cranch, 27); that the debtor, by neglecting to manifest his intention, or to direct as to the application of a partial payment, tacitly surrenders the right to the creditor, and enables him to apply the payment in such manner as he shall think proper, if such application is not inequitable. And if the

* Niagara Bank *v.* Rosevelt, 9 Cow., 409.
† Baker *v.* Stackpoole, 9 Cow., 420.
‡ Niagara Bank *v.* Rosevelt, *supra.*
§ Clark *v.* Burdett, 2 Hall, 197.
‖ Van Rensselaer *v.* Roberts, 5 Den., 470.
¶ 2 Greenleaf on Evidence, 533.
** 15 Wend, 19-29.,

creditor is not in a situation to exercise the right, or if he declines the exercise of the power to make the appropriation, because he has no interest in the question, and the rights of third persons only are concerned, the Court, upon whom the exercise of the power devolves in that case, should make the application on equitable principles." But in the application of this principle our courts are governed to a considerable extent by the rules of equity contained in the Civil Law, from which our entire theory of appropriation of payments emanated.

§ 120. **Under the Roman System,** the debtor only has the privilege of appropriating the payments made to the creditor among one or more of several classes of claims. And where he owes several debts to one and the same creditor, and makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge, whether it be that he gives him a sum of money indefinitely in part payment of what he owes him, or that there be a composition agreed on between the creditor and debtor, or in some other manner; the debtor will continue to have the same liberty of applying the payment to whichsoever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he himself would discharge in the first place, in case he were the debtor. For equity requires that he should act in the affair of his debtor as he would do in his own. And if, for example, in the case of two debts, one of them were controverted and the other clear, the creditor could not apply the payment to the debt which is contested by the

APPLICATION BY THE COURT.

debtor.* But if neither the debtor nor the creditor has made the application, the Court, acting under established rules of presumption, makes it for them, and as the debtor had the right primarily to declare his preference, his presumable intention is first resorted to as a rule for determining such application. Hence arose the principle that the Court should direct the discharge of the most burdensome debt, such application being most beneficial to the debtor, and presumptively such as he intended should be made. The payments were therefore applied rather to an interest-bearing debt than to one without interest; to one secured by a penalty or for which a surety is bound, or in the payment of which his honor might be concerned, rather than to an ordinary debt resting on a simple stipulation; to a discharge of what he owes in his own name rather than one contracted as surety for another. Thus, a payment is applied to a debt for which the debtor has given security, rather than one founded on a simple bond or promise; to a debt that is liquidated and simple rather than to a disputed or conditional claim, and to an old or matured debt rather than to a new or maturing one.† "*In his quæ præsenti die debentur constat, quotiem indistincte, quid solitur, in graviorem causam videri solutum si autem nulla prægravet—id est si omnia nomina similia fuerint —in antiquiorem.*" ‡

* Pandects L., 6 D. de solut.

† L. 3, § 1; l. 4, D. de solut; l 1 et 5 et 97 eod.; Strahan's Domat, Section 2282.

‡ Pandects L., tit. 3, Art. 1. n. to n. 99, per Pothier.

§ 121. **Application of the Roman System.**—The Civil Law rule is followed in Spain,* France,† Holland,‡ and Louisiana.§ In England, the rule does not seem to be settled, but in Scotland, the creditor is favored rather than the debtor. One theory of the Civil Law—that the debtor has the *sole* right of election—is so repugnant to common justice that it has, as we have seen, been totally disregarded in this country. The Roman law proceeded upon the erroneous principle, that the creditor was bound to act upon the golden rule of doing as he would be done by, if he were the debtor, overlooking the fact that there were conflicting interests, that the golden rule should be applied to the debtor as well as the creditor; and that therefore the debtor, as well as the creditor, should be compelled to do as he would be done by under like circumstances.

§ 122. **In this State,** although the question has never been, to my knowledge, distinctly passed upon in its application to the Mechanics' Lien Law, the courts have to a great extent followed the Civil Law rule of appropriation by act of law. While it has often been said, that in this country the courts will apply payments in such a manner as to be most beneficial to the creditor, a different rule prevails in New York State. Thus our courts, as under the Roman system, will apply an open payment to the satisfaction

* Inst. of the Law of Spain, b. 2, Tit. 11.

† Code Nap., Art. 1256.

‡ Vanderlinden's Inst. of Holland b. 1, Ch. 18, § 1.

§ Civil Code of La., Art. 2162.

of a secured, in preference to an unsecured demand,* and to a fixed rather than a contingent liability, † and to a liquidated or past due claim in preference to an unliquidated future or maturing liability.‡ So where a part of the indebtedness is enforceable, and the balance barred by the statute of limitations, the Superior Court held that a partial payment made by the debtor, who received a receipt in full, will be applied by the Court to the collectible portion of the indebtedness; such application being most favorable to the debtor, will be implied to have been so appropriated by him. So where other things are equal, the payment will be applied to an interest-bearing claim, or in such a manner that the payment itself will bear interest.§

§ 123. Same—Principal and Interest—Priority of Date.—It will be seen from a resume of the foregoing authorities, that where the application is to be made by the Court, the Civil Law rule of following the presumable intention of the debtor is very closely followed in this State, although our courts claim to make in all cases a just and equitable application, without following exclusively the interest of either the debtor or the creditor. The Civil Law rule that payments should first apply to the interest,‖ is also followed in this

* Dows *v.* Morewood, 10 Barb., 183; Pattison *v.* Hull, 9 Cow., 747.

† Niagara Bank *v.* Rosevelt, 9 Cow., 409.

‡ Baker *v.* Stackpoole, 9 Cow., 420; and see Thomas *v.* Kelsey, 30 Barb., 268.

§ Davis *v.* Fargo Clarke (V. Ch.), 470.

‖ Strahan's Domat, § 2284.

State,* even though the amount of the payment is precisely equal to the principal,† but when neither principal or interest is due, a ratable application will be made.‡ The Civil Law rule that where the debts are equal in character, priority of date gives priority of payment, is also adopted in this State, and an open payment will be applied to the discharge of the debt first due.§ In the case of an open running account, payment will be applied to the first items of the account.‖ This follows not so much from the principle of the application of payments to distinct debts, as from the rules under which mutual accounts are cast and settled by the law, because the balance of account is considered as a single debt, of which all the items form a part.¶ This principle of appropriating payments to the first charges was adopted in a Mechanics' Lien suit in the case of Hauptman *v.* Catlin,** where the Court of Appeals held, that where the first of several items of a mechanic are unsecured by a lien, there is no objection to crediting partial payments to those items, and enforcing the statutory remedy for the residue; and the same rule was followed in Nevada, where

* State of Connecticut *v.* Jackson. 1 Johns. Ch., 13; Jencks *v.* Alexander, 11 Paige, 619.

† People *v.* County of New York, 5 Cow., 331.

‡ Williams *v.* Houghton, 3 Cowen, 96.

§ Dows *v.* Morewood, 10 Barb., 183; Allen *v.* Culver, 3 Den., 284; Wheeler *v.* Cropsey, 5 How., 288; Hunter *v.* Osterhoudt, 11 Barb., 33; Webb *v.* Dickinson, 11 Wend., 62.

‖ Allen *v.* Culver, 3 Denio., 284.

¶ 1 American Leading Cases, 291.

** 20 N. Y., 247.

the first items accrued before the passage of the act.* The court will make the same application where all the items are secured by liens.†

§ **124. The Prevailing Rule in this Country** seems to be directly the reverse to that of the Civil Law principalities, and substantially adopted in this State. Instead of favoring the debtor, the courts in many of our States will make the application which it is to be presumed the creditor would have made, and which it was his interest to make.‡ Under this contrariety of opinions, it is safest, without following too close to precedent, to adopt a rule founded on common sense, and flexible enough to be applied equitably to any case that may arise. As a basis for such a rule, applicable to a mechanics' lien, the leading case of Harker *v.* Conrad§ commends itself favorably to our notice. The plaintiff in that action held claims against several different houses, all of which were secured by mechanics' liens. A general payment was made without appropriation by either party, and the lien upon one of the houses having expired, the lienor sought to enforce a lien upon the other—which had come into the hands of a *bona fide* purchaser for value—for the full amount of the lien against it, by applying at the time of the trial the entire payment upon the other liens that were lost by his own neglect. The Court, after holding that his election was made too late for an appro-

* Hunter *v.* Savage, etc., 4 Helm., 153.

† See Beckel *v.* Pettigrew, 6 Ohio St., 247; Briggs *v.* Titus, 7 R. I., 441.

‡ 1 American Leading Cases, 283.

§ 12 S. & R. (Penn.) 391.

priation, by act of the parties, said: "In default of actual appropriation, the matter is to be determined by rules and circumstances of equity. The debtor has a right to make the application of the money in the first instance, and failing to exercise it, the same rights devolve on the creditor; but where neither has exercised it, the law nevertheless presumes, in ordinary cases, that the debtor intended to pay, in the way which, at the time, was most to his advantage. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intentment is reasonable and natural, and one which, in most cases, accords with what was actually the fact; it is therefore equivalent to the exercise of the party's right by acts, or an express declaration of intention; where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases. Then, according to this, if the controversy was between the original parties, it would admit of a doubt whether the payment ought not to be considered as having been made on the part of the account, for materials furnished to the houses in Fourth Street, because by having it so applied, the plaintiffs could receive their whole de-

mand, without the expense and trouble of filing their lien against those houses, whilst Harker and Thomas (the owners) would not have been benefited by having it applied to either demand in particular. But the introduction of a purchaser, without notice, in the case, leads to an opposite result. He stands in superior equity to Harker and Thomas, who were bound in conscience to protect the title which they had conveyed to him, and who, there is therefore as much reason to presume, intended to make this payment for his benefit, as there would be to apply it in the way most conducive to their own interest, if a particular application of it would have produced an equal benefit to themselves. The law ought to presume, and does presume, that every man is governed by the dictates of conscience, and that he will do what honesty requires of him, even though it be against his interest. Such presumption can injure no one, nor does it injure the plaintiffs here. They were bound by every consideration of equity to perpetuate their lien on the houses on Fourth Street, and thus, while they secured themselves, to cast the burden on those whose duty it was to bear it. Having failed to do so, the purchaser must stand in superior equity, also, to them, and they must, therefore, bear a loss which arose entirely from their own neglect, and which it was their duty to prevent."

§ 125. **Payment by Act of Law.**—Where a payment is made by or through a legal process, as under execution or administration of assets, the Court will usually apply the money received ratably to all the debts.* Thus,

* 1 Am. Leading Cases, 292.

where the holder of ten bills drawn by the same party, but indorsed by different persons, realized from the drawer a sum of money in England by an action founded upon all of them, the Court held that the creditor could not make the application to eight of the bills, excluding two on which actions were pending against the indorsers here, but that the net amount received must be distributed and applied *pro rata* upon all the bills.*

§ 126. **Fact of Appropriation a question for the Jury.**—Although, in the absence of an effectual application of a payment by the parties, the Court will apportion it, still the question whether or not there has been an application by either of the parties is for the jury to decide. It is a question of fact.†

§ 126 a. **The Burden of Proof.**—Where a sub-contractor, in an action to enforce a lien, has proved his account and a performance of the contractor's agreement with the owner, this *prima facie* shows money due the contractor out of which the plaintiff is entitled to be paid; to rebut it the onus is on the defendant. Rudd. *v.* Davis 1 Hill, 277. When work is done under a contract and all the days of payment are passed, the law will presume that the full contract price is due and payable to the contractor, and to relieve himself from this presumption the employer must allege and prove an actual payment, or such facts as tend to relieve him from the

* Cowperthwaite *v.* Sheffield, 1 Sandf., 416; Aff., 3 N. Y., 243; Butchers & Drovers' Bank *v.* Brown, 1 N. Y. Leg. Obs., 149.

† Righter *v.* Stall, 3 Sandf. Ch., 608; Stewart *v.* McQuaide, 48 Penn., 195; Dickinson College *v.* Church, 1 W. & S. (Penn.), 462.

necessity of payment. And the allegation of payment must be in direct terms and not stated inferentially.*

§ 127. **Assignment of payment.**—It is a good defense by the owner to a lien proceeding in favor of a sub-contractor, that prior to the filing of the lien the contractor made a *bona fide* assignment, either legal or equitable, of the payment or payments under which such lien is sought to be enforced. Such an assignment will have the same effect upon sub-contractors, as would the satisfaction of the payment covered by it.†

§ 127*a*. **Collusive and advance Payments.**—Under the Kings and Queens Act of 1862, which provides that payment made "by collusion, or in advance of the terms of any contract * * shall be ineffectual against demands made in pursuance of the provisions of said Act," the owner cannot set up a *collusive* payment, though made when due under the contract. Neither can he prove an advance payment, though made in good faith.‡

* Harbeck *v.* Southwell, 18 Wis., 418.

† Young Stone Co. *v.* Wardens, 61 Barb., 489.

‡ Hofgesang *v.* Meyer, 2 Abb., N. C., 111.

DEFENSES TO A LIEN.

CHAPTER VII.

SET-OFF AND COUNTER-CLAIM.

§ 128. **Set-Off. — As between Owners and Contractors, and between Contractors and Sub-Contractors.**—In proceedings between the contractor and the owner, the latter may set off a general indebtedness arising independent of the building contract. Any cause of action that would amount to a set-off or counter-claim, under the code, to an action by the contractor against the owner for work or materials under the contract, may be pleaded as a set-off in the foreclosure of a mechanics' lien founded thereon. Such a claimant is not restricted to matters arising out of the contract under which the work is performed or material furnished.* For the same reason a contractor who is made a defendant in the foreclosure proceeding by the sub-contractor, may set up a counter-claim arising against him out of other matters, and recover judgment for the excess; † so the contractor may set up against the sub-contractor any defense that would be available in a personal action between the same parties. *Id.*

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* Owens *v.* Ackerson, 1 E. D. Smith, 691; S. C., 8 How., 99.

† Grogan *v.* McMahan, 4 E. D. S., 754; Miner *v.* Hoyt, 4 Hill, 193; Aff., 7 Hill, 525.

AS AGAINST SUB-CONTRACTORS.

§ 129. **Same—Between the Owner and Sub-Contractors.**—In a lien proceeding, brought by a sub-contractor against the owner, a different question arises. Here no personal liability is sought. The proceeding is entirely *in rem*, to secure from the *thing* benefited the value of the work performed thereon under a contract made with another. A general claim we have seen may be allowed as against the general liability of the defendant, but can it be set off against a specific liability, or will the court limit the set-off to a defense growing out of the specific claim made by the sub-contractor, under such circumstances? It is certain that damages arising out of the same contract, whether they arise through the default of the sub-contractor or of the contractor, may be set off against the sub-contractor's lien,* even though such damage is sustained subsequent to the perfection of the lien, since his employment was subject to the terms of the original contract, and governed in all respects by it.† But whether the owner is entitled to any set-off which is personal to the contractor, and does not arise out of the contract, as a defense to the lien proceeding on the part of such sub-contractor, is still a matter of doubt in our courts.

§ 130. **Same.**—The sub-contractor, merchant, or laborer, often contracts for the performance of the work, relying solely upon the conditions of the contract and the value of the property charged as a security for his undertaking. Under such circumstances he should in equity have a right to demand that the con-

* Miller *v.* Moore, 1 E. D. Smith, 739; Gourdier *v.* Thorp, Id., 697.

† Doughty *v.* Devlin, 1 E. D. Smith, 625.

tract shall be fully performed, *according to its terms*, by the owner; and the owner as to third parties should be estopped from asserting any defense not legitimately growing out of the contract. If he is allowed to set up as against third parties who have trusted in the validity of the contract, a prior indebtedness against the contractor, or damages arising out of other transactions, mechanics and material-men are entirely deprived of any stable security, and rendered liable to have their liens defeated at any time by circumstances entirely beyond their control. This question first arose in the Court of Errors in the case of Miner *v.* Hoyt.* Although it was not the turning-point in the case it was considered by Senator Lott in delivering the prevailing opinion, and also by Senator Sherman in the dissenting opinion. Although they differed on the main point they were in unison on the question of set-off, holding that no set-off could be pleaded by the owner against the sub-contractor. "The mechanic," says Senator Lott, "is entitled to a recovery of his debt out of the moneys due by the owner to the contractor *under the contract*, without reference to the general dealings between them. The statute intended to provide a certain fund out of which the claims of the workmen should be paid, and the moneys agreed to be paid to the contractor are made applicable to that object. That fund can only be reduced by payments *bona fide* made. It is reasonable to suppose that every person doing work or furnishing materials to a building, has reference to the price or sum agreed to be paid to the

* 7 Hill, 525.

contractor, and the times and terms of payment; and it would defeat the object and intention of the statute to allow a general debt to be set off against the amount payable under the contract." Senator Lott, who delivered the only other reported opinion, came to the same conclusion on this point: "The Act of April 20th, 1830, gives to the person who shall have complied with its conditions, a lien upon any payments due or to become due, according to the terms of the contract. And the person who applies in pursuance of the act, it would seem ought not to be defeated of his lien by any transactions between the owner and the contractor, other than such as shall be equivalent to a *bona fide* payment on the contract. The principle of set-off is, in my judgment, wholly inapplicable. The lien is not to be lost because there was an old balance due to the builder from the contractor. Nothing short of actual payments made upon and expressly applicable to the contract, can operate to deprive the party of his statutory lien. This, it appears to me, is a construction of the statute due alike to the terms used in it, and the manifest object of its framers."

Same.—The question was not fully presented again until the case of Devlin *v.* Mack * was decided in the Court of Common Pleas. Here also, the case turned upon another point, but was again considered by the Court. Judge Brady, in delivering the controlling opinion, said: "It has not been decided in any case that I have been able to find, that a defense by way

* 2 Daly, 94.

of set-off or counter-claim, would be available to the owner in an action against him by a sub-contractor, * * * and in Miner *v.* Hoyt,* which was an action predicated on the Lien Law of 1830, Senators Lott and Sherman expressed the opinion that it could not be." After citing the cases under which a set-off was allowed, as against the contractor, under the Act of 1851, Judge Brady said: "It must be borne in mind in relation to these cases, that the Act of 1851, under which they were instituted, provided by its fifth section that 'a bill of particulars of any off-set which might be claimed should be served on the laborer, etc.,' and thus impliedly declared that the owner should be protected as to any such demand. There is no such provision in the Act of 1863, the word off-set is not employed in that statute, and it would seem from its general character, that it was the intention to exclude it as a defense by the owner, at least when prosecuted by a sub-contractor, whose lien attaches when the work to be done by him is commenced." In this opinion Judge F. J. Daly concurred. But Judge Cardoza dissented on the question of set-off, for the reason that in his opinion a careful examination of the case of Miner *v.* Hoyt will show that to be an authority for the proposition that, under the Acts of 1830 and 1832, the owner would be entitled to be allowed for all demands he held against the builder at the time the attested account was served, provided they were such as might have been set-off in an action brought by the builder himself.

* 7 Hill, 525.

THE SUBJECT OF A SET-OFF.

§ 131. **Same.**—I am decidedly in favor of the dicta of Senators Lott and Sherman as modified by that of Judge Brady, that a set-off cannot be allowed in any of the existing statutes in this State against a sub-contractor, not arising out of the contract with the original contractor. Still the rule may be different except under the New York City Act, and the Act of Kings and Queens Counties; as the other acts contain a provision in reference to the notice of set-off similar to that contained in the New York City Act of 1851.

§ 132. **What Claims may be Set Off.**—As a general rule, matters sounding *in tort* cannot be set off to an action for the foreclosure of a lien which is *ex contractu*.* But negligent or fraudulent acts, or omissions which in themselves would be actionable in tort, may be, if growing out of the cause of action in contract, a proper subject for a set-off or counter-claim thereto. Thus, where the plaintiff's demand is compounded of skill and material, and he has greatly misconducted himself, as where an apothecary giving medicine on his own judgment, and not under the direction of a physician, appears to have been grossly negligent and ignorant, this fact furnishes a defense on the general issue ;† for the same reason it may be shown in defense by way of set-off in a claim by a carpenter, that the work was not well done.‡

* Gourdier *v.* Thorp, 1 E. D. Smith, 697–9; Steigleman *v.* Jeffries, 1 Serg. and Rawle, 477; Cooke *v.* Rhine, 1 Bay (S. C.), 16; Kaechlin *v.* Mulballow, 2 Dallas, 237.

† Peak's Law of Evidence, 248.

‡ Heck *v.* Spencer, 4 S. & R., 250; Koon *v.* Greenman, 7 Wend., 12; Epepsly *v.* Bailey, 3 Porter (Ind.), 59; Blood *v.* Enos, 12 Vt., 9; Higgins *v.* Lee, 16 Ill., 501.

§ 133. **Counter-claim.**—As the distinction under the Code between a set-off or recoupment and a counter-claim affects the amount, and not the nature of the claim, it is evident that the same principles will apply to each, where personal liabilities are sought to be enforced, either in the direct or the alternative. Hence, where any defendant in a lien proceeding has a claim against any person, who therein seeks to charge him personally with a deficiency of judgment, he may assert his claim against such plaintiff as a set-off to the extent of the plaintiff's legal demand, and ask judgment on a counter-claim against him for the balance.*

§ 133*a*. **Counterclaim for old Buildings removed by Contractor.**—Where the terms of a building contract make no provisions for the removal of the old buildings occupying the proposed site, for the new ones, or for the use of the materials taken therefrom, and they are still standing at the time the contractor takes possession, they belong to the latter, and can be used by him in his contract or otherwise, as he sees fit. The owner cannot therefore set up the value thereof as a counterclaim to a lien suit founded on the contract.†

* See Grogan *v.* McMahon, 4 E. D. Smith, 754; Miner *v.* Hoyt, 4 Hill, 193.

† Morgan *v.* Stevens, 6 Abb., N. C., 358; see also Cooper *v.* Kane, 19 Wend., 386; and Agate *v.* Lowenbein, 57 N. Y., 604.

DEFENSES TO A LIEN.

CHAPTER VIII.

WAIVER.

§ 134. Waiver by Express Agreement.—A party may always waive a right created by statute for his benefit,* and the Mechanics' Lien Acts do not form an exception to this rule. The right of lien once expressly waived cannot be regained without the consent of the party to be charged therewith. Waiver arises either by express agreement, or presumptively by implication of law. When an owner of property has contracted with another to erect a building or other superstructure, or to do any work, or furnish any materials therefor, upon the express condition that he will not encumber or allow the premises to be encumbered with liens on account thereof, such contractor will be deemed to have expressly waived his statutory rights, and will not be permitted by the courts to enforce a lien contrary to the terms of his agreement.†

§ 135. Same—the Contractor.—Where the owner depends upon the terms of the building contract, alone, as evidence of a waiver on the part of the contractor, he must allege and prove an express covenant by him not to file or enforce the lien. A stipulation against a

* Tombs *v.* Rochester and Syracuse R. R. Co., 18 Barb., 583.

† Mulrey *v.* Barrow, 11 Allen, 52.

lien by sub-contractors or others, will not prevent the contractor from enforcing a personal lien,* but it seems that a covenant by the contractor to *indemnify* the owner against *all* liens will be deemed a waiver on his part, although it will not cut off the rights of sub-contractors, for the owner has secured himself from the effect of their liens. Having specially provided for them he is not damaged by their enforcement.†

§ 136. **The Sub-Contractor.**—It has been held that the express stipulation against liens will affect not only the contractor, but all persons acting under him or depending upon the original contract as a basis for their liens, upon the principle that persons agreeing to furnish labor or materials to the original contractor, do so with reference to such original contract in subordination to its provisions, and to the rights of the respective parties thereto, so far as they relate to the liability of the owner of the property, or so far as they rely on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions, and stipulations of such original contract, and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract. Any other rule would allow the owner and his property to be completely at the mercy of the contractor, who would have the power without any authority to make contracts binding on the owner.‡

* Young *v.* Lyman, 9 Pa., 449.

† Whittier *v.* Wilbur, 48 Cal., 175.

‡ Bowen *v.* Aubrey, 22 Cal., 566.

§ 137. Same.—There is no substantial equity in the plea by a sub-contractor of a want of knowledge of the conditions of the original contract. He knows he is not dealing with the owner, and is presumed to know that the person with whom he deals must have made a contract with the owner, since otherwise no lien could be created by him upon the property; and having knowledge of the existence of a special contract, or even knowledge sufficient to put him on inquiry, he is considered as having notice of all the terms and conditions of such contract, and to have entered into his undertaking with special reference to the extent of his rights with respect thereto. It may be stated, therefore, that where the original contractor has by express agreement waived his right to file and enforce a lien upon property, neither he nor any person acting under him can thereafter claim or assert such a right.* Neither can the sub-contractor enforce a lien in any case where the right is repugnant to the terms of the original contract. Thus, where the original contract provided that the contractor should not underlet any part of the work without the written consent of the owner, and he afterwards entered into several sub-contracts without securing such consent, the Supreme Court of Connecticut held that no lien could be filed by one, who, under a sub-contract performed the original agreement according to its terms; notwithstanding the fact that the owner recognized him by payments on account, made during the performance of the work.† But a sub-contractor will not be deemed to have

* Bowen *v.* Aubrey, 22 Cal., 566.

† Benedict *v.* Danbury & Norwalk R. R. Co., 24 Conn., 320.

waived a lien by signing as surety a bond given by the owner at the time of the sale of the premises, and before the completion of the original contract, which provided that the premises should pass to the grantee "free from all mechanics' liens and other indebtedness of whatever character, growing out of the completion of the same, or in any way appertaining thereto." *

§ 138. **Waiver by Implication**.—A mechanics' lien, although a security by act of law, is governed by the principles applicable to securities created by act of parties. But as it is expressly created by law for a full security to the mechanic, it ought not to be considered as waived or released except by plain facts, † denoting an intention on the part of the lienor to abandon his rights under the statute, or at least such as would reasonably lead third parties to the conclusion that he had waived his lien-security. It is as to the parties themselves, a question of intent; as to third parties, it is a question of fact, determinable from the peculiar circumstances of each particular case. ‡ As to third parties, and generally, as between the parties to the lien, the existence of certain facts creates a presumption of law of an intention by the claimant to waive his security under the statute.

§ 139. **Additional Security**.—It has invariably been held, whenever the case has fairly been presented, that the taking of other security, either on property or that of individuals not parties to the transaction, will be deemed a waiver, and have the effect to pre-

* Hartman *v.* Barry, 47 Mo., 666.

† Hinchman *v.* Lybrand, 14 S. & R., 32.

‡ Mims *v.* Macon, 3 Kelly (Georgia), 333.

vent the acquisition of a lien, or to discharge one already perfected.* Thus additional security by the way of a mortgage,† or a chattel mortgage,‡ or trust deed of real estate,§ or the note or indorsement of a third party;‖ even though such third person be another member of the firm—or the firm itself—of which the owner, primarily liable for the debt, is a member, will prevent the acquisition or enforcement of a mechanics' lien. But the contract, promise, or property taken, must have been intended and accepted as collateral security, or as a guarantee for the performance of the principal agreement on the part of the owner to amount to waiver. A mere promise, by a subsequent purchaser of property subject to a mechanics' lien, in consideration of forbearance, to pay the demand secured by the lien, is not such a waiver as will operate to discharge it, ¶ as it is impossible to draw any implication of an intent to waive a lien, from an act that in itself preserves the tenure of its life; and it is held in Alabama, that the intention to waive a lien cannot be implied from the acceptance of the notes of a third person, which are given as collateral security under the terms and conditions of the original contract.** Such an acceptance will not, it seems, discharge the lien, without an absolute intention

* Brady *v.* Anderson, 24 Ill., 110.

† Barrows *v.* Baughman, 9 Mich., 213.

‡ Kinzey *v.* Thomas, 28 Ill., 502.

§ Gorman *v.* Sagner, 22 Mo., 137.

‖ Muir *v.* Cross, 10 B. Monroe (Ky.), 277.

¶ Mervin *v.* Sherman, 9 Iowa, 331.

** Montaudon *v.* Deas, 14 Ala., 33–46.

can be inferred to abandon it, and look alone to the personal credit of such third party; and it may be stated as a general rule of law, that the contractor who agrees to look only to the personal credit of the owner or of any other person; or the sub-contractor, mechanic, or material-man, who looks solely to the personal credit of his debtor, or of a third party, impliedly waives his right of lien upon the specific property which receives the benefit of his labor or, materials.*

139 a. Same.—It is a well-settled doctrine of the law, that a vendor's lien is lost by waiver, whenever he takes distinct security for the payment of the purchase-money, such as a pledge of goods, a deposit of stock, a mortgage on real or personal property, or the responsibility of a third person.† There is no difference in principle between such a lien and the lien of the material-man.‡ Both are, prior to the filing of the claim, or *lis pendens*, silent liens. Both are legal liens, as distinguished from those created by act of the parties, and both are founded in the Civil Law. In the Roman system, the lien of the mechanic grew out of the vendor's lien; upon the principle that a person building a house upon the lands of another at his request, was deemed to have sold it to the owner; retaining his vendor's lien for the balance of the contract price, as in ordinary sales for the balance of the

* Bailey *v.* Adams, 14 Wend., 201.

† Nairn *v.* Prowse, 6 Vesey, 752; Gilman *v.* Brown, 1 Mason, 191; Williams *v.* Roberts, 5 Ohio, 35; Conover *v.* Warren, 1 Gilm., 501; 4 Kent's Commentaries, 154.

‡ Kinzey *v.* Thomas, 28 Ill., 503.

purchase-money. For this reason the lien of the mechanic under the Civil Law, was enforced in the same manner, and governed by all the principles of the vendor's lien. Our having re-created the former system by express statute, cannot be deemed as changing the nature of the security, or the principles governing it, except so far as they may have been modified by the express terms of the statute.

§ 140. The Contract for Security must be Performed, and the Security Accepted.—As the waiver always arises upon the presumption of an *intentional* abandonment of the right of lien, it cannot be shown to exist without there is proof of some act or acquiescence on the part of the lienor. A mere conveyance of property by the debtor to a trustee to secure a mechanic for work which was neither requested or accepted by him, will not amount to a waiver.* Otherwise the debtor might force the creditor to relinquish securities held by him for his own benefit. Neither will the mere unperfected agreement to receive other security be deemed a waiver. Otherwise it would be equivalent to the theory that the builder must have intended to waive the lien in the event of the refusal to comply with the agreement. In equity, upon the breach of an agreement the party suffering the default is required, if possible, to place the innocent party in his original position. The same principle would require that on the debtor's refusal to keep the agreement to furnish other security, the claimant should not be bound by it, but should be remitted to his original

* Graham *v.* Bolt, 4 B. Mon., 61.

rights. Thus an agreement between the claimant and owner that the former should accept the latter's note, indorsed by a responsible third party and payable in one year thereafter, does not waive or discharge the lien without the note is executed and delivered in pursuance therewith.* Neither would an agreement to execute a mortgage in favor of the claimant, under the same circumstances amount to a waiver, for the reason that the delivery of the mortgage was a condition precedent, and the agreement being executory until it was perfected, all of the obligations of the original agreement and all the rights under it remained in full force.†

§ 141. The effect of Accepting the Debtor's Note.— It is a very well settled rule of law in England and in the leading commercial States, including New York, that the acceptance of the debtor's negotiable promissory note does not discharge a pre-existing indebtedness, unless it is proven to be the express intent of the parties that it should operate as a discharge. At the most it only extends the time of payment until the maturity of the note. As it does not create an additional security it follows that it does not amount to a waiver of a lien, and will not operate to discharge it without the claim itself is discharged by an acceptance of the bill or note as absolute payment.‡ But a nego-

* Lutz *v.* Ey. 3 E. D. Smith, 621.

† Gardner *v.* Hall, 29 Ill., 277.

‡ Carter *v.* Townsend, 1 Clifford (U. S.), 1; Graham *v.* Holt, 4 B. Mon., 61; Van Court *v.* Bushnell, 21 Ill., 624; Brady *v.* Anderson, 24 Id., 116; Odd Fellows' Hall *v.* Masser, 24 Penn., 507; Butts *v.* Cuthbertson, 6 Geo., 166; Greene *v.* Ely. 2 Greene (Iowa), 508; Althause *v.* Warren, 2 E. D. Smith, 657; Teaz *v.* Chrystie, Id., 621; Miller *v.* Moore, 1 Id., 739.

tiable instrument being binding in the hands of an innocent third party against the maker, the Court will require the claimant under such circumstances to produce evidence which will furnish to the debtor an assurance that payment to the claimant in satisfaction of the lien would be a protection to him against a subsequent liability on account of notes given to cover the amount of the lien. The mere production of the notes at the trial and offering to give them up is not sufficient, if in the meantime a third party to whom they were previously assigned had recovered a judgment upon them; as the notes, being merged in the judgment, were absolutely void.*

§ 142. **Effect of a Transfer of Notes by the Lienor.**— It has been held in several of the States that while the receipt of the debtor's note will not waive the right of lien upon the claim for which it was given, nor will an attempt to negotiate it, accompanied with a delivery; yet an actual negotiation and transfer of the note will destroy the right of lien, notwithstanding the claimant might subsequently become liable to the holder upon his indorsement.† This rule is founded upon the theory that the claimant, having by the transfer received payment in full for his claim does not require a lien to enforce the original claim and, further, that having passed away to third parties that which represented his claim against the owner, he has nothing left to form the basis of a lien. On the other hand, it may well be urged that if the claimant regains the

* Teaz *v.* Chrystie, 2 E. D. Smith, 632.

† Hawley *v.* Ward, 4 Greene (Iowa), 36; Scott *v.* Ward, Id. 112.

possession of the notes before the commencement of the foreclosure, he is in the same position as if they had not been transferred, and the owner should not object, as he has not suffered on account of the double exchange. Hence, there is a dictum of the Court of Common Pleas, for the City and County of New York, to the effect that if the claimant has become repossessed of a note before suit, that was received on account of his claim against a building, and transferred for value before its maturity, he may proceed to enforce the lien the same as if he had always retained possession of it,* and this seems to be the prevailing rule upon this subject.†

§ **143. Same.**—As the effect of a transfer still remains an open question in this State, it may not be amiss to note the reasoning of the Supreme Court of Kentucky, in the leading case of Graham *v.* Holt. Counsel contended that the negotiation of the note amounted to a waiver, although before it had been paid by the maker, the assignor had regained possession of it. This was urged both on the ground of an additional security, and that the first assignment destroyed the right of lien, which being once lost could not be regained by refunding the money to the purpose of regaining the note. As to the first point the Court held, that it would be a perversion of the statute, and of the transaction itself, to say that this responsibility of the assignor is such security as destroys the lien, or that his payment

* Teaz *v.* Chrystie, 2 Abb., 109.

† Sweet *v.* James, 2 R. I., 370; Edwards *v.* Derrickson, 4 Dutch. (N. J.), 39; Graham *v.* Holt, 4 B. Monroe, 61; Morrison *v.* The Laura, 4 Mo., 260.

to his assignee in obedience to that responsibility, should have that effect. The responsibility of the assignor does indeed afford to the assignee a security for his reimbursement, in addition to that which the obligation of the maker affords, but it is a security that does not come in aid of the obligor himself nor of his indebtedness. The security which will prevent or destroy the lien, must be a security which is intended to come in place of the lien, and to secure payment for the materials. It is not such security as the creditor himself may furnish, in order to enable him to realize at once, by negotiating the note of his debtor, the price of his materials. As to the second point, the Court said: It was contended, however, that the statute gives the lien to the mechanics and material-men only, and that it was destroyed by the assignment of the note for the debt which it was intended to secure. This is not a legitimate conclusion from the premises stated, nor from the additional fact that the statute provides only for the enforcement of the lien by those persons to whom it is given. The question is not to whom the lien belongs, or by whom it may be asserted in case the debt be assigned, but whether it is thereby destroyed. It is immaterial whether it passes wholly to the assignee, so that he may enforce it without even making the original creditor a party, which, however, should not be allowed; or whether a beneficial interest in it passes, to be enforced in the name or with the assent of the original creditor as a party; or whether it remains wholly in the original party, who still continues responsible for the debt, and is to be enforced only when, by again becoming the holder of the note, he is

again the creditor. Were it conceded that, in consequence of the particular mode pointed out for its enforcement, it does not, as other express liens do, pass absolutely to the assignee of the debt, it would be depriving the statute of the beneficial operation it was intended to have, to give it such construction as would prevent the mechanic from using according to the exigencies of his business, the debt for the security of which the lien is given, but at the peril of losing the security.

§ 144. **Waiver by Extending Credit beyond Statutory Limitation for Enforcement of the Lien.**—A right of action being essential to the enforcement of a lien, it is evident that if the claimant voluntarily extends the term of credit beyond the time for securing or enforcing the lien, he must be deemed to have waived his statutory rights, and to have relied alone upon the personal security of the person to whom the credit is given.* This principle is peculiarly applicable to the New York City Act of 1875, and such other of our statutes limiting the lien to the amount due at the time of filing the notice; for if there is an extension beyond the time limited for filing the lien, it is evident that no sum whatever can be secured.

§ 145. **Same—Effect of Accepting Negotiable Paper.**—In the case of Miller *v.* Moore,† the Court of Common Pleas held, under the New York City Act of

* Scudder *v.* Balkam, 40 Me., 291; Pryor *v.* White, 16 B. Monroe (Ky.), 605; "The Highlander," 4 Blatch. (U. S.), 55; Green *v.* Fox, 7 Allen (Mass.), 85; Emerson *v.* Shawano City, 10 Wis., 433.

† 1 E. D. Smith, 739.

1851,* that the implied extension of credit by the acceptance of a time-note only affects the enforcement of the lien, and does not affect the right to acquire it, as it may be acquired by filing the notice before it becomes due, although the lien cannot be enforced before it becomes payable. The claimants may then enforce it, unless the lien shall have then expired by the limitation which the statute has affixed to it. The same rule, in effect, was subsequently adopted in this Court, in the case of Althause *v.* Warren,† and of Lutz *v.* Ey,‡ and is followed in many of the other States.§ Without there is an actual agreement to extend the time of payment, the execution of a note upon a matured or maturing indebtedness will not amount to an absolute extension, except for the purpose of suit, and in Pennsylvania the Courts treat the acceptance of a time-note for the amount of a debt as simply a change in the nature of the claim, by making it more capable of being negotiated. It does not *per se* extend the term of the original credit, and the creditor may waive the note, and sue upon the original claim at any time after it becomes due.‖ While this rule cannot prevail in this State, it may so far affect the question of time as to allow a lien to be filed under acts similar to that of New York City, before the

* See Part III., "Statutes."

† 2 E. D. S., 657.

‡ 3 Id., 631.

§ Bodley *v.* Denmead, 1 W. Va., 249; Ashdown *v.* Woods, 31 Mo., 465; McMurray *v.* Taylor, 30 Id., 263; Finch *v.* Redding, 4 B. Mon. (Ky), 87.

‖ Hill *v.* Witmer, 2 Phila., 72.

maturity of a note, provided that the claim upon which it is founded is due and payable.

§ **146. Waiver and Estoppel—Special Cases.**—It is unnecessary to treat specially of the subject of estoppel as a defense, it being so intimately connected with that of waiver. Whenever a person acts upon the strength of a waiver, either express or implied, by another, of any specific right, the one waiving such right is estopped from afterwards asserting it, to the prejudice of such person. The subject of estoppel as a defense, is therefore necessarily included to a great extent in that of waiver, from which in this respect it usually springs. Thus, if a person holding a mechanics' lien upon property, makes such representation, or performs such acts as to induce another to purchase the premises, believing that the lienor does not look to the land but to other means for his payment, the principles of waiver and estoppel will both apply to prohibit the claimant from setting up his right of lien to the injury of such purchaser;* and it has generally been held, that a lienor, by uniting with the owner in the transfer of the estate charged by the lien, impliedly waives his rights therein, and the lien is destroyed, even though the conveyance is in terms made subject to all liens and encumbrances thereon.† This principle is in consonance with that adopted in the case of a judgment-lien by the Supreme Court of Maryland, in the case of Doub *v.* Barnes,‡ in which it is held that, where judgment creditors assent to an

* Scott *v.* Orbison, 21 Ark., 202.

† Alexander *v.* Slavens, 7 B. Monroe (Ky.), 356.

‡ 4 Gill (Md.), 1.

assignment by the debtor to trustees, for the payment of his debts according to their legal priorities, and subsequently induce, by their conduct, a third party to purchase the real estate charged with the judgment liens, believing that they will look to the general fund held by the trustees, and not to their specific interest in such realty for their payment, they will be deemed to have waived their specific liens, and estopped from enforcing them by a sale of such demised premises; the purchaser acquiring by their conduct a valid equitable defense thereto. The same principle applies in respect to a particular charging lien upon personal property. Thus, the acceptance by one having a specific lien upon certain funds, of an order thereon payable to a third party, is a waiver of his right therein, at least to the extent of such acceptance.*

A sub-contractor is not estopped from asserting his rights against the property on account of his recommendation of the contractor as a proper person to make the building contract, nor for assuming a verbal responsibility, void under the Statute of Frauds, that no liens should be filed thereunder;† nor for fraudulently allowing the contractor to leave the State without first enforcing the collection of the claim from him personally.‡

* Tiernan *v.* Jackson, 5 Pet., (U. S)., 580.

† Abham *v.* Boyd, 7 Daly, 30; and see McGraw *v.* Bayard, 96 Ill., 146.

‡ Merrit *v.* Pearson, 58 Ind., 385.

DEFENSES TO A LIEN.

CHAPTER IX.

MERGER.

§ 147. Intimately connected with the subject of waiver is that of merger. Whenever a superior or additional security is taken, the doctrine of waiver applies so as to extinguish the original security; so whenever a greater and a less estate coincide in the same person without any intermediate estate, or a superior contract, debt, or cause of action is accepted for an inferior one, there is a merger, and the lesser estate or credit being swallowed up in the superior one, is absolutely extinguished.*

§ 148. **Merger Affects the Debt only.**—In respect to mechanics' liens, this important distinction must be observed; waiver affects the security, while merger affects the debt. Thus, where a bond, which is a specialty contract, is given for the claim of the mechanic, or a judgment, which is a contract of record, is rendered thereon, there is a merger and extinguishment

* See Roberts ads. Jackson, 1 Wend., 478; James *v.* Morey, 2 Cowen, 246.

of the debt; but is the lien, which is a security for the debt, also extinguished? Where the original debt is extinguished by payment, the security, existing only as its incident, is also extinguished. Whether its extinguishment by merger will so affect it, will depend upon the principles governing the doctrine of merger, and the relations borne by a mechanics' lien to the debt itself. The general rule is, that by a judgment or a decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. By virtue of the judgment of the Court it loses all its vitality, and ceases to bind the parties to its execution. Its force and effect is then expended, and all remaining legal liability is transferred to the judgment or decree. Once becoming merged in the judgment, no further action at law or suit in equity can be maintained on the instrument; and all rights and liabilities originally imposed by, or growing out of it, terminate with the rendition of the judgment.* The original debt is "drowned in the judgment," and must henceforth be regarded as *functus officio*.†

§ 149. Same.—But it must be borne in mind that the debt and the security are each distinct and separate in their nature. The prosecution of the note or bond of a third party, held as collateral security, does not affect the principal debt, and a judgment recovered thereon cannot merge or discharge the original indebtedness. The debt being independent of the security,

* Wayman *v.* Cochrane, 35 Ill., 152; Hogg *v.* Charlton, 25 Penn. St., 200; Freeman on Judgments, page 181.

† Id. Biddleson *v.* Whitel, 1 W. Black, 507.

is not affected by such judgment, which is simply the same security in another and higher form.*

§ 150. **The Converse Rule,** that the recovery of judgment upon the original indebtedness will not merge or affect the security, has also been held to be true. A mortgage given for the payment of a bond is only incident to the bonded debt,† and can only exist and draw aliment from the debt to which it is incident; but it is not so intimately connected with the principal debt as to be acted upon by the law of merger, when such debt is transformed into a judgment. It simply changes the relation of the security, which becomes a security for a judgment instead of for a simple or specialty debt.‡ In other words, although the identity of the original claim is lost, its cotemporaneous incidents are preserved. The appurtenant securities following the claim through its transformation attaches itself to that which represents it. And this, although, in the case of a mechanics' lien, the very essence of its creation, the beneficial work upon real estate, is extinguished by the judgment of the Court, which forms a new contract by act of law,

* Drake *v.* Mitchell, 3 East., 251; Bank of Chenango *v.* Hyde, 4 Cowen, 567; Butler *v.* Miller, 5 Denio, 159; Davis *v.* Anable, 2 Hill, 339; Day *v.* Leal, 14 Johns., 404; Chipman *v.* Martin, 13 Id., 240; U. S. *v.* Hoyt, 1 Blatchf., 326; and see to the same effect in the case of a mortgage held as security, Hoyt *v.* Martense, 16 N. Y.; *sed contra*, Averhill *v.* Loucks, 6 Barb., 19; Benson *v.* Paine, 17 How., 407, and Peters *v.* Sanford, 1 Den., 224.

† Vansant *v.* Allmon, 23 Ill., 30; Olds *v.* Cummings, 31 Id., 188.

‡ Per Chief Justice Walker in Wayman *v.* Cochrane, 35 Ill., 152.

without any of the peculiar qualities of the original one.

§ **151. Same—Reasons for this Rule.**—There are two controlling reasons why a mechanic's lien will not be destroyed by the entry of a judgment. First, because there is merger of the claim and not of the security; Second, because it is not the acceptance of a higher security. The first we have already considered; the second is fully set forth by the Supreme Court of Pennsylvania, in the case of John Thompson,* substantially as follows: Whenever the law works an extinguishment the creditor has gained a higher security; the thing substituted is more beneficial to the creditor than the thing originally contracted for. Now, the debts of the mechanic or material-man were originally simple contract debts, but for their security the act has created a lien on the building; so that the security which the creditors have in relation to the safety of the debts rank with that of a judgment or mortgage. Therefore the acceptance of a bond and warrant of attorney, and the entering of a judgment on the bond, is not a waiver or extinguishment of a mechanic's lien.

§ **152. In this State** the question of merger in the case of a mechanic's lien has not been considered by the courts; there is, however, a dicta in the case of Teaz *v.* Chrystie,† to the effect that where judgment has been recovered by a third party upon notes given

*See to the same effect Schanck *v.* Arrowsmith. 2 Browne, 297. 1 Stockt. (N. J.), 314, and Crean *v.* McFee, 2 Miles (Penn.), 214

† 2 Abb., 109.

to the mechanic by the owner and assigned to such third party, that if the judgment was re-transferred to the claimant before the commencement of the foreclosure, he might enforce a mechanic's lien founded upon the original claim. In that case the judgment was recovered and the notes upon which it was based were surrendered to the claimant and tendered to the Court for cancellation in the foreclosure suit; the Court held that the notes having merged in the judgment were void, and that it would be necessary for the claimant to first have possession of the judgment representing the original debt.

§ 153. The Judgment Represents the Original Debt.—The principles of merger require, where a judgment has been recovered upon the debt of the claimant in a personal action, and the lien is subsequently foreclosed, that the amount of the lien must be limited to the amount of the judgment, since it is a security for the judgment and not the original claim merged in it. Thus, where a bond bringing ten per cent. interest was merged in a judgment thereon which by law only carries seven per cent., the Court held that upon the subsequent enforcement of the mortgage given to secure the bond, the judgment and interest thereon at seven per cent. was the amount for which the mortgage was enforceable. The bond having been extinguished, the rate of interest connected with it was also extinguished. As a judgment is a lien upon all the real estate of the debtor, the only effect of a subsequent judgment upon the special lien of the mechanic is to antedate that of the judgment, as of the time of filing the claim.

§ 154. Personal Judgment.—After the recovery of

a personal judgment upon a lien claim it is doubtful whether personal liabilities can be enforced in the subsequent lien proceeding. The foreclosure of a lien is now becoming a proceeding *in personam* as well as *in rem*. Hence, if in such a case the complaint asked for a judgment for deficiency against the party personally liable, the defendant might well set up the former judgment in bar. Otherwise there would be double judgments for the same cause of action. The most that can be done under such circumstances is to enforce the lien against the property charged therewith, then the amount received therefrom will be deducted from the original judgment, as the receipts from its security, and the balance remaining due thereon may be then enforced against the general estate of the debtor.

§ 154*a*. **Effect of Judgment on a void Lien.**—Where a mechanic's lien which mis-described the property intended to be covered thereby has been foreclosed, the judgment does not so merge the lien claim as to prevent a subsequent claim therefor from being properly filed. Such a holding would prefer shadow to substance, and would permit a mere technicality to triumph over broad and beneficent equitable principles.*

* Gray *v.* Dunham, 50 Iowa, 170.

DEFENSES TO A LIEN.

CHAPTER X.

SPECIAL DEFENSES.

§ 155. The Loss or Destruction of the Buildings Affected by the Lien.—The mechanics' lien is by specific terms a charge upon the building or structure into which the labor or material enters, and *the lot of land* on which the same stands. As the land itself is encumbered, it would seem that the destruction of the building would not affect the validity of the lien, but that the same might be enforced upon the realty covered by it: and this view seems to be adopted in Illinois, where it has been held that the lien continues against the land, although the entire materials, buildings, and improvements, on account of which the lien accrued, be removed, rendered worthless, or destroyed by accident;* for the reason that the position of the rights of the parties once being fixed and determined by a compliance with the statute, it would not afterwards become defeated by accident or the act of the owner. It being upon the freehold and upon the structure, the severance of the structure from the freehold would not affect the rights of the parties. It

* Gaty *v.* Casey, 15 Ill., 132; Steigleman *v.* McBride, 17 Id., 301.

does not follow the structure from place to place, but continues upon the lot. If, however, the structure is wrongfully removed from the plot on which it was erected, and sold for cash, the claimant may also follow it, as the lien will not be destroyed by the act of the owner or of an irresponsible third person.

§ 156. **Same—The Pennsylvania Rule** is, however, different. Their courts holding that, although the lien attaches to the soil as long as it is connected with the structure, the severance and the destruction of the building by fire or otherwise works a destruction of the lien; for the lien originates with the building, depends upon it for existence, and must necessarily share its fate. No amount of labor or materials furnished for the erection of a building would create a building if no building should be erected. So, if the building, after erection, should be destroyed by accident before the ground on which it stood passed to a purchaser, the lien would be gone. The reason for binding the land is gone with the building. Any other construction would defeat one of the objects of the law, which was to promote the improvement of the country by encouraging mechanics and materialmen to furnish labor and materials for erecting buildings. But, if the lien continue on the land after the improvement is destroyed, how are those who erect the new building on the premises to be protected? Their equity against it is undoubtedly superior to the claims upon the building that was destroyed. Under such a rule, all further improvement on the premises might be prevented; and, therefore, if the building for which the materials were furnished, or labor done,

be consumed before a mechanics' lien is filed, the ground upon which such building was erected, and all future buildings upon it, are discharged from such lien.

§ 157. **Same.**—A mechanic having an insurable interest in the building,* should, to prevent any possible loss, protect himself by taking a builder's risk thereon; having failed to do this, his lien, in the case of a fire virtually destroying the main building into which his work has entered, will neither extend to the lot nor to appurtenant erections connected with the principal structure, nor to the materials saved from the fire. The lien having attached to the main building primarily, and to the lot and its appurtenances only incidentally, as an adjunct or incident to such structure, and necessary to its proper use and enjoyment, the lien is entirely lost by its destruction.† Whatever we may think of the hardship of such a rule, we must not forget that mechanics are clothed with special privileges and preferences, to the destruction of that equality in which equity delights, and that, not so much on the ground perhaps of their being a more meritorious class, as because the growth and improvement of the country is supposed to be promoted thereby. Being a privileged class, they may be entitled to a liberal construction of the law in their favor, especially in matters of form or mere technicalities; but although entitled to a liberal, they have no right to a latitudinarian construction, embracing matters

* Protection Ins. Co. *v.* Hall, 15 B. Mon., 411.

† Wigton & Brooks' Appeal, 28 Penn. St., 163.

neither within the letter or the spirit of the law. In an absolute sense, it is just as hard for the creditor, who advances the funds for the erection of the building, to lose his money, as for the man who puts into it his labor or material; and apart from positive law, he has an equal right to paramount claim. If postponed on principles of public policy, the preference should cease when the policy, and from that moment should be the other way; for if the original claims still remained liens on the reconstructed building, then so far as improvements depend on privileged liens, they would be arrested or greatly impeded, instead of being promoted.*

§ 158. Same.—The Pennsylvania rule was recognized in the dicta of the Court in New Jersey, in the case of Coddington *v.* Dry Dock Co.,† wherein it was sought to charge a lien upon a floating dock attached to the land, but built elsewhere in sections, and floated to the location intended for its permanent resting-place. The Court refused to sustain the lien for the reason that the act only intended to create a lien upon land, or what in construction of law is land, and not on merely movable property. It did not intend to give a lien upon labor not performed upon the land upon which it is to be a lien, nor on materials before they were made land. As soon as the materials were converted into land, then the land was seized by the lien by reason of the building, and the building was seized by reason of the land, and from thence it follows, that if the land and the building by any

* Wigton & Brooks' Appeal, 28 Penn. St., 163.

† 2 Vroom, 477.

chance become separated the lien is lost upon both; the land, because it has lost the building and the increased value given to it; and the building, because it is separated from the land.

§ 159. **Same—Under the Roman System** the preference of the architects, undertakers, and workmen, and of the person furnishing money, upon the improvements created by their aid, is restricted to what remains of them in being, and does not affect the whole body of the estate, as does the preference on account of repairs which have preserved the whole estate in being. For if there remains nothing of the improvements, the estate not being anything the better for them, and nobody profiting by them, there remains no longer any cause for preference, and when some of the improvements do subsist, the privilege (lien) only applies to the value of what remains. *Quasi pignus retinere potest eam rem.**

§ 160. **Same—In this State** the question has never been specifically raised. I agree with Houck, that equity favors the Pennsylvania rule; or at least, that the balance of equities are with it; and that in case of a destruction of the building by act of God, the public enemy, or by accident, or whenever its use as a building has become entirely lost, without any negligence on the part of either parties, the lien itself is gone. But that whenever the building is removed by the owner, he should be estopped from setting up that fact as a defense to the lien. I cannot see how, in such a case, the existence of a mechanics' lien would be any

* L. 13, § 8, D. de aut. empt. et vend.; Domat's Civil Law, Part 1, Book III., Tit. 1, Sec., V.

more prejudicial to the rights of contractors subsequently erecting a building upon the same plot of ground, than would a mortage given by the owner thereon, for his indebtedness in the construction of the first building. The filing of a lien produces as ample a notice as the recording of a mortgage.

§ **161. Over-Statement of Claimant's Account.**—Nearly every Mechanics' Lien Act contains a clause requiring that the claimant shall file a notice of lien within a specified time, which notice shall contain *a just and true account of the plaintiff's claim* after deducting all payments therefrom. What is the effect of the non-performance of the requirements of the statute in respect to the amount of the plaintiff's claim? Will it, in case he has filed a claim for more than is justly his due, deprive him of a lien for what is actually due, for the reason that he has not fulfilled the strict requirements of the statute; or will it simply give the owner the right to reduce his claim to the amount actually due? This question has been differently answered in different States, and has not been considered in our Courts.

§ **162. The Missouri Rule—Effect of Omitting known Credit.**—In Missouri, a rigid rule of construction is followed, which defeats the lien entirely if the claim has materially overstated the amount of the lien, for the reason that if any variance is allowed, the mechanic or material-man may omit to give the proper credit for a large as well as a small amount, and the owner thereby prevented from disposing of his property on account of an apparent lien, which, had it been correctly stated in amount, would not have been

objectionable. So also, the owner, to reduce it to the proper amount, may be forced into a protracted litigation at great cost and expense, and also prevented for an indefinite period from obtaining the market value of his property. When, therefore, to prevent such disastrous consequences, the Legislature has required a statement under oath or otherwise, of the actual amount of the claimant's account, it seems but just that he should so state it, under the peril of an entire forfeiture for non-fulfillment of the statutory requirements. Hence, where the amount of the claim filed was one thousand seven hundred and seventy-one dollars, and it was admitted that a payment of one hundred and sixty dollars had been omitted, it was held that the lien was entirely lost.*

§ **163. Deductions from the Nature of the Lien.**— The mechanics' lien is purely a creature of the statute. It is an extraordinary remedy, and he who seeks to avail himself of it must strictly comply with its conditions.† The statute points out a certain mode and manner of proceeding, and if that mode and manner is not pursued the remedy cannot exist. It requires that all just credits shall be given; that the property shall be accurately described, so that it can be identified in applying the lien; that the lien must be filed within a specified time; and that the name of the owner or contractor, or both, if known, shall be inserted. These, all taken together, make up the constituent or component parts necessary to give validity to the lien. And there is no authority for the omission of any one of

* Hoffman *v.* Walton, 36 Mo., 613.

† Benton *v.* Wickwire, 54 N. Y., 729.

those constituents, nor for considering any one more vital to the existence of a lien than any of the others. It has been always held in this State that the failure to file a claim within the specified time will bar a lien,* and also that the name of the contractor or debtor should be correctly stated,† and that the premises should be properly described in the notice of lien.‡ In default of any of these requisites the lien is held to be invalid. It is difficult to draw a line between an omission or mis-statement in any of these respects and an over-statement of the plaintiff's claim by the willful omission in his bill of particulars of one or more credits. It is not a sufficient answer to say that the defendant is not injured thereby, as he has the power to reduce the amount on trial by showing that such payments have been made. Otherwise the statute would create a special privilege in favor of a certain class of debtors, and also empower them to either force the creditor to an expensive litigation or submit to the enforcement of an unjust claim against him, and in the meantime, to charge his property with a fictitious encumbrance.

§ 164. **Same—In Massachusetts** the courts have held that the omission of a credit destroys the lien without regard to the intention of the claimant. Thus, under a law providing that the lien shall be dissolved unless the person seeking to avail himself of it files within sixty days with the Register of Deeds "a certificate containing a just and true account of the demand justly due to him, after all just credits given,"

* Spencer *v.* Barnett, 35 N. Y., 94.

† See Hubbell *v.* Schreyer, 14 Abb., 284.

‡ Donnelly v. Libby, 1 Sweeney, 259.

that the amount of all just credits was a fact within the petitioner's own knowledge, and that he was bound to state it truly. When, therefore, the notice filed stated the work at day's work to amount to twenty-four dollars and six cents, and the credit to be one dollar, and the evidence showed that five dollars had been paid on account, the Supreme Court reversed a judgment, for the reason that by a non-performance with the terms of the statute the claimant had forfeited his entire lien. "If the owner of the land," said the Court, "had paid the amount thus stated, he would have lost four dollars upon settling with his contractor."* The authority of this decision has not since been questioned in that State. To meet the apparent hardship of this rule the lien law was subsequently amended by the insertion of the provision that "no inaccuracy in stating the amount due for labor, shall invalidate the proceedings, unless it shall appear that the person filing the certificate has willfully and knowingly claimed more than his due." I have been unable to find a decision in any of the American courts holding the direct converse of the rule as established in Missouri and Massachusetts, as to the effect of an omission of credits under similar provisions of law, except the case of Heamann *v.* Porter,† which was practically overruled in the later case of Hoffman *v.* Walton.‡ The case of Busfield *v.* Wheeler,§ cited by Phillips ‖ to

* Lynch *v.* Cronan, 72 Mass. (6 Gray), 531.

† 35 Mo., 137.

‡ 36 Id., 613.

§ 13 Gray.

‖ Phillips on Mechanics' Liens, § 356.

show that the lien will not be defeated by the statement of too large a sum honestly demanded, was an action upon a personal retaining lien on machinery, the Court expressly stating that the rule in the case of mechanics' liens, requiring an accurate statement, was not applicable in that proceeding. So the later case of Whitney *v.* Joslin * was decided under the amended statutory provision, quoted *Supra*, the Court holding simply that the lien would not be invalidated by a statement which included a non-lien claim, where made in good faith and the whole amount was actually due, though not lienable. So, in Connecticut, a statement of notes representing the value of the labor and accrued interest thereon,† will not invalidate the lien.

§ 165. **Same—Effect of Over-stating the Debits.**—I am satisfied, from a careful reading of the decisions, that only intentional misstatements of the amount of the claim ought to avoid the lien. Such statements as would hold the claimant liable for willful perjury in the verification of the claim come particularly within the rule. Hence, a misstatement of the amount of credits, which must be supposed, ordinarily, to be within the knowledge of the person receiving the money, is more open to criticism than a statement of the value of services or materials, without they are rendered under an express contract at a certain fixed price pre-arranged between the parties. Where the claim is unliquidated and incapable of being liquidated by a mere mental computation, a wide discretion is given to the estimate

* 108 Mass., 139.

† Hopkins *v.* Forrester, 39 Conn., 351.

of the creditor of the value of his own services or materials; although he will be held liable to its gross abuse. The essence of the defeasance is fraud, gross negligence, or willful misrepresentations, combined with the non-performance of the requirements of the statute. The over-statement unintentionally of the value of the work performed by the mechanic ought not to avoid a lien for the true value.* But where it is shown not only from the size and character of the building, but from the books of the claimant, that the amount of materials charged in the lien statement could not possibly have been used in the building, and that it was the result of either fraud or gross negligence to have furnished the amount called for on account of the building charged by the lien, the court may condemn the entire transaction as fraudulent and void. It is not safe to assert that a trifling excess over what rigid economy would require for the erection of the structure will vitiate the account, as that would be a construction both unnecessary and unjust; but where it is obvious that it is the result of either gross negligence, willful perversion, or fraud, sound policy and a just regard to the interest of the owner requires that the consequences should be visited on his own head.†

§ **166. Effect of Bankruptcy or Insolvency as a Defense.**—After the lien has, in good faith, been perfected by the filing of the notice, no proceeding either by the debtor or by third parties, can, as against the claimant, affect the specific lien in the property

* Underwood *v.* Walcott, 3 Allen (Mass.), 569.

† Dickinson College *v.* Church, 1 Watts & Serg., 466.

charged thereby. Justice Story invariably held, under the Bankrupt Act of 1841, that an adjudication in bankruptcy superseded and destroyed all prior attachments levied within a certain time prior to the filing of the petition.* This position, except in Louisiana,† has been strenuously rebutted by the courts in this country, on the ground that an attachment creates an existing lien which cannot be dissolved by an act of bankruptcy on the part of the defendant.‡ But under the Bankrupt Act of 1867, as amended in 1874, the assignment of the bankrupt's effects operates as a dissolution of any attachment of his property made within six months next preceding the commencement of the proceedings in bankruptcy. In the leading case of Foster *v.* Heirs of Stone, § arising under the application of a mechanic's lien to the estate of a decedent, the Court pointed out the distinction between a mechanic's lien and a lien created by attachment, which has since been accepted and followed in the Bankruptcy Courts, to the effect that the security given by statute to the mechanics and material-men, is not like that of an attaching creditor, obnoxious to the letter, spirit, and policy of the Bankrupt Act, because it works no injustice to any creditor. An attaching creditor has no claim for preference over other creditors, except by

* Foster's Case, 2 Story, 131; Bellows and Peck's Case, 3 Id., 428.

† Fisher *v.* Robinson, 3 La., 457.

‡ Downer *v.* Brackett, 21 Vt., 599; Rowell's Case, Id., 620; Haughton *v.* Eustis, 5 Law Reporter, 505; Franklin Bank *v.* Batchelder, 23 Me., 60; Kittredge *v.* Warren, 14 N. H., 509; Davenport *v.* Tilton, 10 Met., 320.

§ 20 Pick., 540.

his attachment; whereas, when a mechanic obtains a lien under the statute, and, relying upon it, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement, to the extent of the value of his labor or materials furnished for the building, and in this respect he has a marked preference over the other creditors, who have trusted to the personal credit of their debtor.

§ 167. **Same.**—"The operation of the law," says the Court, *In re* Coulter,* "is a convenient substitute for the giving of a mortgage or other express security, day by day, for the value of such work and materials, and is to be considered and enforced as such. Upon the faith of this security so given, the one party furnishes labor and material, and the other secures the benefit of them. This transaction is not in violation of the term or policy of the Bankrupt Act, even although the owner of the property should be insolvent at the time; because such security or lien is only equivalent to the additional value which the creditor has by this means given to the property of the debtor, and, therefore, does not diminish the assets of the latter, applicable to the payment of his pre-existing debts; like advances made in good faith to an indebted person, to enable him to carry on his business, upon security taken at the time, which do not violate either the terms or policy of the Bankrupt Act, since the debtor gets a present equivalent for the new debt he creates and the security he gives. Accordingly, if the law secure the lien to the mechanic or material-man from the doing

* 5 National Bank. R., 64.

of the work, or the furnishing the materials, and it attaches to the building from that time, upon the condition subsequent that the lien creditor file a notice of his intention to hold such lien within a certain period from the completion of the building, the commencement of proceedings in bankruptcy, between the doing of the work or furnishing of materials, and the filing of such notice, does not impair or affect the lien, or the right of the lien creditor to continue it by filing the notice. The lien existed under the Mechanics' Act, prior to the commencement of proceedings, and the right under such circumstances is preserved by the Bankrupt Law."

§ 168. **Adjudication in Bankruptcy.**—There is no doubt, therefore, that subsequent acts of bankruptcy, or a subsequent adjudication, will not invalidate a mechanic's lien, but it would undoubtedly affect the specific claim of a mechanic if the adjudication preceded the formation of a lien under it. If the lien attaches by virtue of the work done or materials furnished from the time of the commencement of the labor, or when the materials commenced to be furnished, as it does in most of the States, bankruptcy proceedings will not affect the rights of the claimant at the time of the filing of the petition, except to stay all proceedings on his lien; and the notice of lien may be filed thereafter, and the necessary acts may be taken to preserve, but not enforce the lien, as such acts cannot be deemed encroachments upon the authority of the Bankruptcy Court.*

* Clifton *v.* Foster. 3 National B. R., 162; Keller *v.* Denmead, 68 Penn., 449.

§ 169. **The Rule where the Lien is created by filing the Notice.**—Under the Mechanic's Lien Statute of Michigan, providing that "Such lien shall not attach, unless the said contractor or some one in his behalf shall make and file with the Register of Deeds of the county in which the lands shall lie, a certificate," etc., and provided "that no lien created by virtue of this act shall be binding upon the owner, part owner, or lessee, until he shall have been notified of the filing of such lien with the Register of Deeds," the Court in Bankruptcy held that where proceedings "to attach" the lien had not been consummated by filing the required notice previous to the commencement of proceedings in bankruptcy, that the lien could not be considered as constituting a secured claim.* In all cases where the lien is acquired by virtue of filing the notice, a prior adjudication takes precedence, and the property passes to the assignee free from the claims of the mechanics or material-men.† Applying this rule here, if the notice is filed prior to filing the petition in bankruptcy the mechanic may retain and enforce his lien; but, except under the New York City Act, the right to a lien will be cut off by an adjudication before the notice is filed. The lien only attaches to the interest of the owner at the time of the filing of the lien. If his property is previously vested in the Court or an assignee, he has no interest, and the lien cannot attach. I think, however, that under the present act in New York City, a peti-

* *In re* Sabin, 12 National B. R., 142.

† *In re* Dey, 3 National B. R., 81.

tion filed after the work is commenced will not prevent the mechanic from acquiring and enforcing a lien for the amount of labor then performed or material then furnished. But no claim will be allowed for work done after the petition is filed,* and the amount required to complete the contract should, in such a case, be deducted.

* *In re* Cook, 3 Biss., 122.

PART II.

OF THE PERFECTION AND ENFORCEMENT OF A LIEN.

THE PERFECTION OF A LIEN.

CHAPTER XI.

THE TIME FOR FILING THE NOTICE.

§ 170.—The Legislature has given mechanics and material-men the *right to* a lien. They have not presented to them a security already perfected for their labor or materials, but have said "You may have a lien, *provided* you conform to the terms of the statute. You must, within a limited period from the completion of your contract, or of the contract to which you have contributed your services or goods, file a notice in the clerk's office in the manner and form prescribed by the statute." The claim being filed and proceedings instituted, the lien is secure, and unless its duration is specially limited by the act creating it, it will continue on the property as long as it may be litigated.* But unless the claim is filed within the specified period, the statutory rights will be defeated, and the claimant will be restricted to the common law rights of other creditors.† This requirement being a jurisdic-

* Sweeney *v.* McGittigan, 20 Penn. St., 320.

† Hubbell *v.* Schreyer, 14 Abb., N. S., 284; Hilliard *v.* Allen, Cush. (Mass.), 536; Mulloy *v.* Lawrence, 31 Mo., 585.

tional one, must be fully complied with to secure a lien.*

§ 171. **When Limitation Commences.**—It is very easy to ascertain the abstract period of limitation, as it is prescribed by every statute. It is a specified number of days—usually thirty, sixty, or ninety from the performance of the labor or furnishing of the materials for which the lien is sought, or from the completion of the building, or of the original contract. If, therefore, the commencement of this period can be determined, the limited time is a mere matter of computation.

§ 172. **Under the New York City Act.**—Where the period commences from the completion of the building or of the original contract, the subject is relieved from much of its perplexities, since the contract itself, which designates the work to be done, will usually be a correct guide to the time of its completion. It will be completed upon the fulfillment of all its terms and conditions. When the contractor has a right to demand the money payable upon the performance of his agreement, his right to file a lien commences to run. And here, through accident or design, the New York City Lien Act of 1875 is rendered more simple than that of 1863. The former Act required the claimant to file the lien "at any time before the whole work is completed, *and* within three months after the work is done or the materials furnished for which a lien is sought." If the sentence stopped short at the word

* Doughty *v.* Devlin, 1 E. D. Smith, 625; Donaldson *v.* O'Connor, Id., 695; Lutz *v.* Ey, 3 Id., 621; Hauptman *v.* Catlin, 20 N. Y., 247; Spencer *v.* Barnett, 35 N. Y., 94.

"completed" it would only have been necessary to have ascertained when the entire work was finished. By substituting the word "or" instead of "and," the claimant is now in as good condition as if the first clause only was used; as the limitation commences at the "completion of the building, improvement, or structure," or of "the alteration or repair thereof," if the claimant so elects.

§ 173. **Same.**—It may be contended, in opposition to this view, that the word "and" may be construed as meaning "or," and *vice versa*, where it is evident that it was so intended by the persons employing it. Such a construction, if made applicable here, would harmonize the acts of 1863 and 1875 in this respect. But this rule has only been adopted in the case of contracts. It has never, to my knowledge, been applied to the construction of a statute granting a remedy unknown to the common law. Furthermore, there is no patent intention on the part of the lawgivers to model the statute, in this particular, after that of 1863. No such intention can be presumed for the purpose of altering or changing the express terms of the statute. This position is not without authority. The question arose in the case of the Okisko Co. *v.* Matthews,* under a similar clause in the Maryland Statutes, in which their Supreme Court said:

"And besides, the lien is preserved until six months after the materials are furnished, OR *after the completion of the work.* If this instruction had been given the jury would have been authorized to find against

* 3 Md., 168.

the claimant, if the goods had been delivered more than six months, although the particular house on which these materials were used may have been completed within that time. To be sure it was in evidence that all the houses had been completed for more than six months, except one, and it is probable that the jury would have so found; but that is no reason for the courts taking that question from their consideration. The prayer should have been so framed, *as to have presented both alternatives* to the jury." *

§ **174. Same.**—It is, without doubt, the intention of the statute that the claimant should have the entire period of limitation in which he may file a lien. The statute reads, "at any time *within*" the specified period. It follows, therefore, and may be laid down as an invariable rule, that the limitation does not commence until the claimant has secured the right to file an effective lien, without he has waived the right by giving credit. As a consequent to this rule, it may be added, where, as in New York City, a lien is invalid without there is a payment due to the claimant at the time of filing the lien, that the limitation does not commence to run until the liability to pay the claimant for his work or materials, or for some portion thereof, has become perfected so that nothing but a term of credit, entered into between the parties, will prevent the immediate enforcement of a personal action thereon. The giving of a credit does not extend the time for filing a lien; the time may commence to run, therefore, upon the completion of the work, whether a payment

* See also Charleston Ins. Co. *v.* Corner, 2 Gill., 410.

is then due or not, since the claimant might then have filed an effective lien had he not extended the time of payment beyond the time when it naturally fell due. The converse of this rule will not always hold true, since an action may be maintained for each installment due upon an entire contract for the erection of a building while the period of limitation does not commence until the building is completed; with this exception, the converse rule will also hold true, and may be thus stated: The limitation will commence to run for materials furnished and services rendered on every distinct contract or separate order upon the completion thereof.

§ 175. **Distinct Contracts or Requests.**—Every distinct contract must stand on its own merits, and the lien must be filed upon each one within the limited period after its completion.* The only difficulty arises from the application of this principle, that is to decide whether the materials were furnished under a separate contract or formed part of a continuous or entire contract. A mere general agreement to pay for "such materials as thereafter should be furnished" cannot be construed as such an entire contract as to connect the materials separately ordered and delivered in pursuance therewith. Each order forms a separate and distinct contract, although founded upon a general contract.† And it may be stated as a general rule that demands arising out of separate sales constitute inde-

* Livermore *v.* Wright, 33 Mo., 31; Sweet *v.* James, 2 R. I., 270.

† Hubbell *v.* Schreyer, 14 Abb., 284 (reversed in the Court of Appeals, but not on this point); Downing *v.* Kemp, 4 Sand., 147; Spencer *v.* Barnet, 35 N. Y., 94.

pendent contracts,* unless a contract, either express or implied, so embraces all the items as to form them into a single or entire demand.† A lien under a second contract will not cover, so as to bring it within the statutory limitation, work done under a former superseded contract for the erection of the same building.‡ Nor can the separate accounts of two or more claimants be tacked together so as to make one continuous account or contract; the lien for each must be filed within the statutory period. §

§ 176. **Spencer *v.* Barnet**‖ being the only case wherein the question of time has been fairly presented and passed upon by the Court of Appeals, is considered a leading case on this point. Unfortunately the lower Courts have widely differed as to the principles actually established in this case. Many seem to consider it as an authority for the proposition that a lien filed by a material-man, under an entire contract, will only cover the goods furnished within the statutory period. A careful reading of the opinion will show that this proposition is too general. All that case really holds is, that in an action to enforce a lien for materials, founded upon the value of the materials *and not upon the contract*, the lien can only be enforced to the extent of the materials furnished within the statutory period. This comes within the principle hereinbefore stated, that whenever an action can be

* Cashman *v.* Bean, 2 Hilton, 340.

† Secor *v.* Sturgis, 16 N. Y., 548.

‡ Cocheco Bank *v.* Berry, 52 Me., 293.

§ Hazard Powder Co. *v.* Loomis, 2 Disney (Ohio), 544.

‖ 35 N. Y., 94.

THE RULE IN THE SPENCER CASE.

commenced upon the separate items of an account the statute will run against each item from its date. A glance at the facts in the Spencer case will show the extent of the rule as a binding precedent. The materials were furnished under an agreement, whereby the claimant was to deliver to the owner materials for the construction of a building. The price was fixed on all materials that should be delivered before navigation closed. As to the rest, he was to be paid at *the usual market rates.* It will be seen that this was not an entire contract for the performance of a specified act in consideration of a certain fixed sum of money, but an arrangement establishing the price of future sales. Each order and delivery was a contract in itself, for which a separate action could be maintained, and upon which the statutory limitation would necessarily run. In the language of the Court: "The claim made by the plaintiff in his notice of lien *is not for non-payment under a contract for materials*, but for the price of materials furnished." This decision arose under the King's County Act of 1853,* Section 4 of which provides that "such notice must be filed with the Clerk of said county before the expiration of thirty days, after the completion of the work, or within sixty days after the materials are furnished." It is plain, that if the claimant had entered into a contract to furnish 150,000 feet of lumber, of assorted sizes, for the building in question, for which he was to receive the sum of $7,500, or $50 a thousand, the "materials" would not be "furnished" until the full

* See Part III., "Statutes."

amount of the lumber was delivered according to the contract, and a lien "founded on the contract," if filed within thirty days from its completion, would cover the entire claim, although the performance might have occupied a year. This rule is particularly true, under statutes similar to that of 1875 for New York City, where the lien will only cover the amount due at the time of filing, as any other ruling would deprive the claimant of a lien for any amount, except the portion furnished within the sixty days, prior to the completion of a contract.

§ 177. Application of the Rule in the Spencer Case.—Two (somewhat dissimilar) decisions have lately been rendered by the Supreme Court, under the authority of Spencer *v.* Barnet. One, Goodale *v.* Walsh,* holding that a person performing labor at several times, upon a building by "day's work," was only entitled to a lien for the work done within the thirty days next previous to the filing of his lien. The other, Costello *v.* Dale,† holding that the lien will cover extra work, ordered at different times, during the performance of the entire contract, although nearly all of it was ordered and performed prior to the thirty days next preceding the filing of the lien. The former decision was made under the King's County Act of 1866, and the latter under a like provision contained in the Amendment of 1869 of the State Act. But the same theory is accepted in each of these cases. The entire lien was allowed in the latter case, because the work being accessory to an entire

* 2 Thompson & Cook, 311.

† 3 Thompson & Cook, 493.

contract became a part and parcel of it, so that there was really one contract of an increased amount. "The plaintiff's evidence," says Judge Barnard, in delivering the opinion of the Court, "tended to establish that the work was done on the same premises, and was done by order of the defendant during the period in which the work was done under the written contract, and, subsequently, that it was all really one piece of work, although the items were directed and done at different times, between April and the 14th of August. If the plaintiff was to be credited, he was entitled under the lien act to *all* his labor." In the former case, the claimant being employed by the day, generally, he was able to quit work at any time and demand his day's wages. Hence, for each day, there was a separate implied contract of hire with a separate performance, and the limitation, therefore, expires thirty days after each of such performances. Taken in this sense, the rule does not conflict with that stated in Costello *v.* Dale or with any of the former adjudications on this point.

§ 173. **Same.—Will not Apply to Work Done Under an Entire Contract.**—Considering the rule in the Spencer case to apply—as is contended by the Court in Goodale *v.* Walsh—to liens filed by material-men under an entire contract, will it apply equally to the performance of services under the same circumstances? There is a distinction between the furnishing of materials—which must necessarily be divided into items, specific portions being delivered as required in the construction of a building—and that of the services of a mechanic or laborer, which is usually a single continu-

ous act, forming but one item. From the unity or continuity of performance in the latter case, it would seem to follow that if any portion was within the time, the whole is within the time. Again it may well be urged that work cannot all be done at one time, but necessarily during a protracted period, and the statute, by referring to it in the words "after the work is done," must have referred to the whole work that was "done" or completed at that time, thus for example: A, the owner, contracts with B, a carpenter, to perform the carpenter work in the erection of a building in the sum of one thousand dollars, payable upon the completion of the work. In pursuance therewith B performs the work, and the performance occupies nine months. Not receiving payment, he files a lien upon the building one month after the work is done, for the amount due under the contract—$1,000. In this nine month's work there is but one item and one performance. Can the Courts sever that item, and give judgment for a fractional portion of the entire contract? It may be so, but the entire scope of the law seems to forbid such a construction. The first section of each of our lien statutes provides that any person who shall perform *any* labor under a contract with the owner shall, upon complying with the terms of another section, requiring a notice to be filed within a specified time after the work is done, have a lien for the *value of his labor*. In our supposed case, A filed his lien within the required time after the completion of his work, he is therefore, by the express terms of the statute, entitled to a lien for the full value of his labor.

§ 179. **The Rule in other States.**—It cannot be

presumed that in the Spencer case the Court of Appeals, in the absence of an express statement to that effect, intended to establish the precedent that the lien claim filed within the specified time after an entire contract has been completed, will only cover that portion of the services or materials rendered within such period, for such a construction is entirely unsupported by the courts of other States. It has always been held that a party who works or furnishes materials under an entire contract, which may not be wholly finished for years, has no claim in fact or in law, until the contract has been performed. He cannot divide his claim into parcels and file separate liens. He must wait until the contract is completed; for where the bargain is for a gross sum, he can fix no price upon particular parts of the work, and, therefore, the time for filing the claim does not begin to run until after the date of the last act done in the execution of the contract; that is, when the contract is for materials after the last delivery.*

§ **180. Computation of Time.**—It is a general rule of statutory construction, that when a specified act must be done within a certain period, that in the computation of the time, the first day will be excluded and the last included.† This follows from the fact

* Bartlett *v.* Kingan, 19 Penn., 341; Pratt *v.* Campbell, 24 Id., 184; Shaffer *v.* Hull, 2 Penn. Law Journal, 93; Fowler *v.* Bailey, 14 Wis., 125; Bolton's Appeal, 3 Grant's Cases, 204; Derrickson *v.* Edwards, 5 Dutcher (N. J.), 468.

† Hahn *v.* Dierkes, 37 Mo., 574; Hoffman *v.* Duel, 5 Johns., 232; Jackson *v.* Van Valkenberg, 8 Conn., 260; Snyder *v.* Warren, 2 Cowen, 518.

that only *full* days are intended by the statute, the first day, being only partial, is not reckoned. Hence, under a statute requiring a lien to be filed within six months from the completion of the work, if the work is completed on the second of June, a lien may be filed on the second day of December,* but a lien filed on the third day of December would be too late.†

§ 181. Same—Where the Last Day is a Legal Holiday.—Considerable difference of opinion exists in the courts of this country as to last day of actual performance where the limitation falls upon a *dies non*. It is, however, a prevailing rule in the construction of statutes, that when the last day of performance of a given act falls on Sunday, the act must be accomplished on the preceding day,‡ following the rule of computation in the case of commercial paper where days of grace are allowed. But in the case of ordinary contracts,§ and also in pleadings, the rule is more lenient and gives the following day for the performance, on the principle that otherwise the days for actual performance would not be complete. This principle had been adopted in construing the period of limitation in lien cases.‖

* Esler *v.* Peterson, 1 Legal Gazette (Penn.), 303.

† Hoops *v.* Parsons, 2 Miles (Penn.), 241. See also to the same effect, Schubert *v.* Crowley, 33 Mo., 564.

‡ Sedgwick on Statutory and Constitutional Law, 420; Browne *v.* Wellington, 1 Sandf., 664; *Ex parte* Dodge, 7 Cow., 147; People *v.* Luther, 1 Wend., 42; Bissell *v.* Bissell, 11 Barb., 96; Patrick *v.* Faulke, 45 Mo., 312.

§ Salter *v.* Burt, 20 Wend., 205.

‖ Carothers *v.* Wheeler, 1 Oregon, 191.

Sunday as an intervening day is never excluded in the computation of time where the period is over a week.*

§ 181*a*. **What Facts amount to a Continuance of the Time.**—In the case of Cole *v.* Uhl (46 Conn., 296), the Court held that the delay in the furnishing of a few articles for two months after the contract was substantially performed, where such delay was caused or acquiesced in by the owner, would, as to him, extend the time when the statute commenced to run. But it seems the rule is different where the rights of third parties are involved.† But no lien will hold where all the work furnished within the statutory period was attached, and did not in fact go into the building.‡

* King *v.* Dowdall, 2 Sandf., 131; Patrick *v.* Faulke, 45 Mo., 312.

† Schulenburg *v.* Vrooman, 7 Mo. App., 133.

‡ Gale *v.* Blaikie, 129 Mass., 200.

THE PERFECTION OF A LIEN.

CHAPTER XII.

REQUISITES OF THE NOTICE.

§ **182.** The filing of a notice of claim, in the manner prescribed by statute, is an essential and jurisdictional requisite, without which a lien can neither be secured nor enforced.* Personal knowledge of the indebtedness, and that it is a proper charge against the premises, will not take the place of the public notice so as to affect the rights of a subsequent purchaser.† Neither can the notice of lien be waived by the owner to the prejudice of third parties.‡ Nor will any defect therein be waived by a general appearance in the foreclosure proceedings, it being a jurisdictional objection.§ Where the notice is defective, the Court has no power to amend it so as to give the claimant a lien under the statute. ‖

§ **183. Form of Notice.**—No particular form of notice

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* Shelby *v.* Hicks, 5 Sneed (Tenn.), 197; Stewart *v.* Christy, 15 La. An., 325; Davis *v.* Schuler, 38 Mo., 24; Beals *v.* Cong. B'nai J., 1 E. D. Smith, 654.

† Sinclair *v.* Smith, 3 E. D. Smith, 677.

‡ McKim *v.* Mason, 3 Md. Ch. D. 186.

§ Beals *v.* Cong. B'nai J., 1 E. D. Smith, 654.

‖ Id., Hallahan *v.* Herbert, 2 Daly, 253; Conkling *v.* Wood, 3 E. D. Smith, 662.

is necessary, but it should, in substance, comply with the requirements of the law, as no averment can be dispensed with that the statute prescribes.* It should show affirmatively, on its face, that it is within all the provisions of the statute.† A safe and convenient rule in the preparation of the notice of claim, is to first read carefully the particular law under which the right of lien is claimed, and then write down, in the language of the statute, each averment made necessary to the creation of a lien.‡

§ 184. **The Address.**—The notice of lien, usual in practice, contains: 1st. The address. This is usually in the name of the County Clerk, with whom the lien is filed. I never could see the object in requesting that officer to take notice of a lien in which he has not the slightest interest. It should be filed with him and addressed to the public, or at least, "to all whom it may concern." The object of the notice is to inform the public that the claimant asserts a lien on a certain piece of property to a certain amount. So that any person dealing with the owner in respect to such property, shall have knowledge of the claims of mechanics or material-men thereon.§ "To the Clerk of the County of —— and all others whom it may concern," combines practice with reason, and may well be adopted. But any address will answer, as none is necessary.

* Hubbell *v.* Schreyer, 14 Abb. (N. S.), 284.

† Smaltz *v.* Knott, 3 Grant's Cases (Penn.), 227; Peck *v.* Hensley, 21 Ind., 344.

‡ Phillips on Liens, p. 673.

§ Peck *v.* Hensley, 21 Ind., 344.

§ 185. **2d. The Name and Residence of the Claimant** under nearly all of our statutes, is essential, and it is preferable to insert it in the body of the notice, although a notice stating that "I claim a lien, etc.," and signed "John Doe, Claimant, No. 120 Fifth Avenue, New York City," would be sufficient. It is customary, but not essential, to state in the notice whether the claim is made as contractor or as sub-contractor.* Neither is it necessary to state whether the claim is made as partners or individuals,† but where a claim is made by joint contractors or by co-partners, the name and residence of each person or member must be inserted.‡ If the name and address of only one member appears in such a case no lien can be acquired, either in favor of such claimant or of the firm.§ Where the law requires the "names of the party claimant" to be inserted, but is silent as to their place of residence, it is sufficient to state the firm name,‖ and where the statute is not specific on the subject, the initials of the given name of the claimant is sufficient.

§ 186. **3d. The Amount of the Indebtedness.**—The amount of the claim must be stated in order to ascertain the extent of the lien, and designate the amount of deposit necessary to discharge it. The claimant is limited, as against the specific property charged to the amount stated in the notice, together with the interest and

* Lutz *v.* Ey, 3 E. D. Smith, 621.

† Knabb's Appeal, 10 Penn., 186.

‡ Hauptman *v.* Catlin, 3 E. D. Smith, 666 (S.C., Aff., 20 N.Y. 247).

§ Hubbell *v.* Schreyer, 14 Abb., N. S., 284.

‖ Black's Appeal, 2 W. & S., 179.

costs of foreclosure, and although the judgment may be for a less amount,* it cannot exceed that sum.† It follows that if no amount is mentioned in the notice the lien is entirely void, and it has so been held.‡ As to the effect of an overstatement of the amount of a lien and of the willful omission of known credits, see Chap. X, *infra*.

§ 187. **4th. The Person against whom the Claim is Made** is usually a statutory requisite, and designates the debtor, or one personally liable to the claimant on account of the work done or materials furnished, whether he be the owner, contractor, or sub-contractor. Under the New York City Act of 1851, the courts held that it was not necessary to state with whom the claimant made his contract,§ but this has since been made a statutory provision, and should be followed more closely. But the name of one of several joint debtors has been held sufficient.‖

§ 188. **5th. Statement of Claim.**—It is unnecessary to set forth the items of the indebtedness in the notice of lien. The gross amount or value of the materials furnished or work done, together with the aggregate payments and a statement of the balance due, is sufficient under any of our statutes, and where the law is silent on the point, the ac-

* Rollin v. Cross, 45 N. Y., 766.

† Dunning *v.* Clark, 2 E. D. Smith, 535; Eagleson *v.* Clark, Id., 644; Prot. U. *v.* Nixon, 1 E. D. Smith, 671.

‡ Prot. U. *v.* Nixon, 1 E. D. Smith, 671.

§ Hauptman *v.* Catlin, 3 E. D. Smith, 666; S. C., 20 N. Y., 247; Lutz *v.* Ey, 3 E. D. Smith, 621.

‖ Tibbetts *v.* Moore, 23 Cal., 208; Roach *v.* Chapin, 27 Ill., 194.

tual balance claimed to be due is sufficient.* The character of the work and the kind of materials should also appear, as this tends to prevent fraud on the part of the sub-contractor or collusion with the contractor or owner, enables the owner to ascertain the correctness and reasonableness of the demand, and gives the most definite information and protection to lienors *inter se*, and to subsequent purchasers and encumbrancers.†

§ 189. **6th. The application to the building** must also be shown in the notice. In Pennsylvania, where "the nature of the work and materials" must appear in the notice, the courts have held, that the application to the building must be explicit enough to exclude work done upon any other property, and that a statement that it was performed "for or about the erection and construction of the said building and appurtenances" is not sufficient, as the claimant must bring himself affirmatively within the provisions of the statute, and not wait for antagonistic creditors to show the reverse.‡ But this principle is founded under a system that does not extend to the main building the charge for work done upon its appurtenant structures. Such an allegation would not only be sufficient but is customary and proper under our laws.

* Brennan *v.* Swasey, 16 Cal., 140; Selden *v.* Meeks, 17 Id., 128; Laswell *v.* Presb. Church, 46 Mo., 279; See Knight *v.* Norris, 13 Minn., 473; Heston *v.* Martin, 11 Cal., 41; Thomas *v.* Huesman, 10 Ohio St., 157.

† Carson *v.* White, 6 Gill (Md.), 17; Noll *v.* Swineford, 6 Penn., 187; Davis *v.* Livingston, 29 Cal., 283; McAuley *v.* Mildrum, 1 Daly, 396.

‡ Barclay's Appeal, 13 Penn., 495.

CONTENTS OF THE NOTICE.

§ 190. **7th. The name of the Owner** is another essential requisite under most of our statutes for the security of a valid lien. Excepting in New York City, the notices of lien are docketed in the name of the owner; by designating the name of any other person than the true owner, the docket fails to show a charge against the property. Hence, as to subsequent purchasers or encumbrancers without actual notice, no lien could be asserted in such a case. Where the owners are joint tenants, or tenants in common, they should be severally designated, but if they are a joint stock company or corporation, or an unincorporated association, transacting business under an associate name, they may be designated by their corporate or associate name.* It has been held that the notice is sufficient if it fully identifies the owner, although the name may not be accurately stated. Thus, "The State Board of Education of Illinois," instead of "The Board of Education of the State of Illinois," is not a fatal variance,† the name and style being substantially the same. Where there are several joint owners, and they are not all named, the notice will be sufficient to charge the interest of those named,‡ and where the contract is made with one of several owners, who alone was liable for the work, a statement of lien against all, does not invalidate it as to the interest of the contracting owner.§

* Beals *v.* Cong. B'Nai J., 1 E. D. Smith, 654; Wilson *v.* Commissioners, 7 W. & S., Penn., 197.

† Board of Education *v.* Greenbaum, 39 Ill., 610.

‡ Davis *v.* Livingston, 29 Cal., 283.

§ Hillburn *v.* O'Barr, 19 Geo., 591, and see Tibbetts *v.* Moore, 23 Cal., 208.

§ **191. Same. Under the New York City Act** of 1875, the term, "the name of the owner, or reputed owner, *if known*," is inserted. Similar provisions are contained in the laws of California and Missouri, and the courts there hold the claimants to a very strict compliance with the terms of the statute.* But the necessity for a strict rule does not exist in New York City as liens are there docketed in the name of the particular street or locality, and not in that of the owner. An error of statement, therefore, does no practical harm, and it is sufficient to keep within the strict letter of the statute. There is no doubt, but that the adjunct "if known" refers to both the clauses, "the name of the owner" and "or reputed owner." Hence, it is not necessary to specify either, if unknown to the claimant, and the insertion by mistake of an erroneous name is not fatal, as the claimant may show that the name of the owner was unknown. But the person asserting a lien ought to make diligent inquiry as to the ownership of the property, and specify that fact in the notice, together with the name of the person reputed to be the owner, if he cannot, in the time allotted to him, fix the fact of ownership beyond a doubt.

§ **192. 8th. The Description of the Property** must be sufficient to establish its identity and extent, and, in the City of New York, to enable the County Clerk to docket the lien against the specific lots sought to be charged. The premises must be described,† or, at the

* See Hicks *v.* Murray, 43 Cal., 515; Hoffman *v.* Walton, 36 Mo., 613.

† Donnelly *v.* Libby, 1 Sweeney, 259.

least, referred to* in the notice of claim. A description by street number is sufficient where that indicates a certain locality, and a known and specific quantity of land, and the street or lot number is always *prima facie* sufficient.† A diagram of the lot charged with the lien, showing the street and side streets, the size of the lot, and distance from a side street, is commonly used, even where the street number is known, and it is the best description where it is unknown. It has been held a sufficient description in the notice of lien to designate the side of the street and the name of the nearest cross streets; in other words, to designate the block on which the building is situated, without showing the relative location in such block. The complaint, however, must contain a full description, so as to determine beyond a doubt the particular building sought to be sold under the lien.‡

§ **193. Same.** The fact that the designation only applies to the building in question often assists in making a description sufficient, which would otherwise be incomplete. Thus, where a description conveys a building on the "west side of Thirteenth Street, between Henry and James Streets, Philadelphia, belonging to ——" (the owner described in the notice of lien), was held to be sufficient, although another street intervened between the building and one of the cross

* McAuley *v.* Mildrum, 1 Daly, 396.

† O'Halloran *v.* Sullivan, 1 Iowa, 75.

‡ Duffy *v.* Brady, 3 E. D. Smith, 657; S. C., 4 Abb., 432; Hotaling *v.* Cronise, 2 Cal., 60; O'Halloran *v.* Leachy, 39 Ind., 150; Harker *v.* Conrad, 2 S. & R. (Penn.), 301; Kelly *v.* Brown, 20 Penn., 446.

streets named; it appearing that the owner had no other house on Thirteenth Street.* For the same reason a description of a house "in Dillersville, adjoining lands of John Jones and the Pennsylvania Railroad," is sufficient if the owner had no other property to which the description would apply.† So describing the property as "the Odd Fellows Hall at Columbus, Pa.," ‡ "a cotton mill at Marseilles owned by B. B.," § "Moore's New Quartz Mill, being at or near the town of Scottsville in Amador County, Cal.," ‖ "The works known as the South Fork Canal, near Placerville in Eldorado County,"¶ have been held sufficient where the description will apply only to the property intended to be charged with the lien. And if the property is thus identified, the lien will not be lost because a specific definition connected therewith is erroneous, as the only object in filing the claim is to notify third parties of the rights of the claimant in the property in question. Thus "the several buildings known as the Gas Works of La Crosse City Gas Light and Coke Company, situated on lots numbered 8, 9, 10, etc., in Block Number 14" is sufficient, although the description as to the block is erroneous.** Neither would an error in the points of compass, or other-

* Springer *v.* Keyser, 6 Wharton (Penn.), 187.

† Shaffer *v.* Hull, 2 Penn. Law Journal, 93; Knabb's Appeal, 10 Penn., 186; Strawn *v.* Cogswell, 28 Ill., 457.

‡ Odd Fellows Hall *v.* Masser, 24 Penn., 507.

§ Strawn *v.* Cogswell, 28 Ill., 457.

‖ Tibbetts *v.* Moore, 23 Cal., 208.

¶ Gordon *v.* South Fork Canal Co., 1 McAllister C. C., 513.

** Brown *v.* La Crosse City, 16 Wis., 555.

wise, that does not mislead third parties be held fatal.*

§ 194. **Same. The Lien will be held Insufficient** where it applies equally well to other property not intended to be charged thereby. As, for instance, where it is filed against two or more houses in a certain block without specifying, particularly, the houses in question.† So a description of property as, "one acre, 'more or less, lying north of, or adjoining, the north-west corner of Sixby's Addition," to a certain village,‡ or, as a "double saw-mill in Clarion County, situate on the waters of the Clarion River, and on the east side of said river,"§ is void for insufficiency.

§ 195. **Same. The Best General Rule** to be adopted as to the sufficiency of a description is that given in § 379 of Phillips on Mechanics' Liens, to the effect that if enough appears from the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it will be sufficient.‖

* McCoy *v.* Quick, 30 Wis., 521; Lindsley *v.* Cross, 31 Ind., 109.

† Pennock *v.* Hoover, 5 Rawle Penn., 291; *In re* Hill's Estate, 2 Penn., L. J. R., 96; Donnelly *v.* Libby, 1 Sweeney, 259; Matlack *v.* Lare, 32 Mo., 262.

‡ Munger *v.* Green, 20 Ind., 38.

§ Washburn *v.* Russell, 1 Penn., 499; and see Howell *v.* Zerbee, 26 Ind., 214.

‖ As to the property to be covered by the notice of lien, see *ante*, §§ 108, 111, and for the form of liens under the several acts in this State, see Poste (Practice and Forms).

THE NOTICE OF CLAIM.

§ 196. The Notice of Claim.—The first act to be performed by the practitioner after familiarizing himself with the facts in a given case, and the law applicable thereto, is to draft the notice of claim. This should be done, if possible, before the claimant leaves the office, so that his verification may be taken and the lien filed at once. After preparing the notice according to the form hereafter set forth, a copy should be taken to be annexed to the complaint, and the lien filed with the clerk, who is entitled to a fee of ten cents. It is safest to see that the clerk minutes correctly the time of filing upon the back of the notice, and to ascertain the next day whether it has been properly entered upon the lien docket in the index of the street upon which the property fronts, as an error in this respect may be fatal to the lien. The notice drawn according to Form No 1, will apply under all the acts in this State. The verification is not required under the "Kings and Queens" Act, nor under the "State Act" of 1873. This form was drawn under the New York City Act of 1875, and is peculiarly adapted to the "Buffalo" Act, which followed that in its strictness. The "Cities" and other Acts, in this are less stringent in their requirements.

FORM OF NOTICE OF CLAIM.

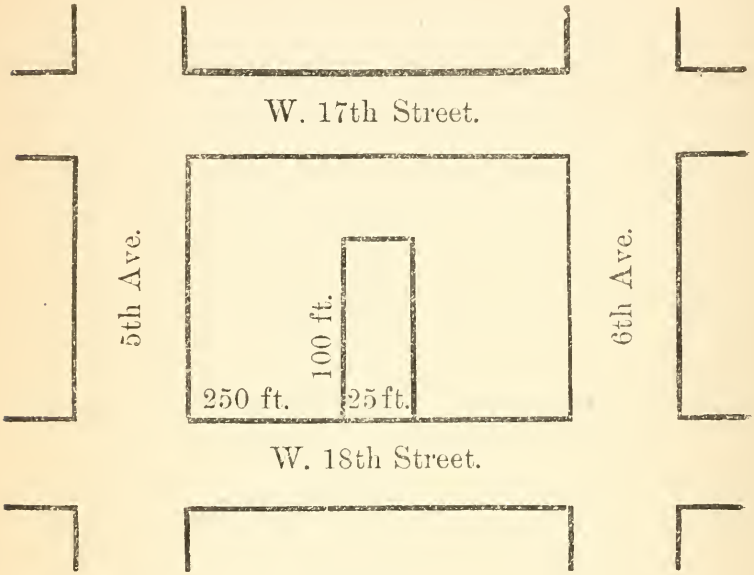
FORM No. 1.

Notice of Claim.

To William Walsh, Esq., Clerk of the City and County of New York, and to all others whom it may concern.

Take notice, That *I*, A. A., residing at *No.* 14 *East Tenth* Street, in the *City of New York*, have a claim against B. B., the owner of the premises hereinafter described [If the claimant is a sub-contractor, state "against C. C., the contractor for the erection of the building hereinafter described"], amounting to the sum of *one thousand dollars* after deducting all just credits and offsets; and that the claim is made for and on account of *labor performed upon and materials furnished* for, and to be used in the construction of a certain building erected upon the premises hereinafter described; that said *labor was performed and materials furnished*,* for the said B. B. [*Or*, in the case of a sub-contractor, "the said C. C. under a contract with said B. B."]; that the terms upon which the same was performed and furnished was for *cash payable upon the completion thereof*,‡ and that *all the work and materials* for which this claim is made *has been actually performed and furnished* [If not, then state the amount that has been done], and that the owner of said building, appurtenances, and lot of land, is B. B., as this claimant is informed and verily believes; that the said lot of land is situated in the City and County of New York, on the *southerly* side of *West Eighteenth* Street, between *Fifth and Sixth Avenues*, and is known as

No. 34 *West Eighteenth Street*, that the following is a diagram of said premises :



And also take notice that *I* claim a lien upon said building and the appurtenances, and lot of land on which the same is constructed, pursuant to the provisions of an act of the Legislature of the State of New York, entitled [insert the proper designation of the act in question].

Dated at New York, this 20*th* day of *June*, 1875.

(Signed) A. A., Claimant.

" *City and County of New York*, ss.

" A. A., being duly sworn, says that he is the *claimant*

mentioned in the foregoing notice of claim, that he has read the said notice and knows the contents thereof, and that the same is true to his own knowledge.*

"A. A.

"Sworn to before me, this 20th day of June, 1875.

"JOHN BROWN,
"*Notary Public.*"

NOTE A.—Where the claim is founded upon a contract in writing, which sets forth the terms, time given, and condition of the contract in lieu of the averments, between the * and the † insert the following: "In pursuance with a contract in writing, a copy whereof is hereunto annexed and forms a part of this claim, which said contract contains a full statement of the terms, time given, and condition of the contract, under which the said labor was performed and materials furnished." This is only required in the "Buffalo" act.

* Or, under the "Cities' Act," "to the best of his information and belief."

FORM No. 1.

Notice of Claim.

Note C.—Where the notice of claim is verified by some person other than the claimant, that fact, together with the reasons for it, should appear therein, thus:

"*City and County of New York*, ss.:

"M. N., being duly sworn, says that he is the attorney [agent, bookkeeper, employee or otherwise, as the case may be] of the claimant mentioned in the foregoing notice of claim, that he knows the contents of said notice, and that the same is true of his own knowledge. Deponent further says that the reason why this verification is not made by the claimant is that the facts set forth and contained in said notice are peculiarly within the knowledge of this deponent.

"M. N.'

"Sworn to, etc."

Note D.—Where the claim is made by copartners, the name and residence of each member must be inserted thus: "Take notice that we, John Doe, residing at 450 Fifth Avenue, in the City of New York, and Richard Roe, residing at No. 34 West Twenty-fourth Street, in said city, as copartners in business under the firm name and style of John Doe & Co., have a claim, etc."

Note E.—Instead of "under a contract with," it is sufficient in Kings and Queens Counties to state, "by the consent of," and under the State Act of 1873, the "permission of the owner."*

* Or, under the "Cities' Act," "to the best of his information and belief."

THE PARTIES TO THE ACTION.

CHAPTER XIII.

THE PLEADINGS.

§ 197. **The Commencement of the Action: Parties.** —Except under the "State Act" the foreclosure of a lien is by an action similar in all respects to the foreclosure of a mortgage. The parties are the same in the former case as they are in the latter, except that it is customary to require prior as well as subsequent lienors to be made parties defendant, so that the rights of all parties claiming under the same statute for the same general work, may be tried in the same action.* Sometimes the Act, like that of 1875, permits the joinder of several or all of the lienors as parties plaintiff. In such a case each may bring his action separately, or all may unite.† And where separate actions are brought, it is usual for the Court to require all the issues to be tried in the first suit, by filing affirmative answers in the nature of cross-complaints. Although it is advisable to join prior lien claimants as defendants, so as to determine the extent of their claims and the right of priority (and to that

* In such a case the rights of each claimant as against the others, as well as against the owner, may be enforced as fully as if separate actions were brought Whitney *v.* Higgins, 10 Cal., 547; Dewing *v.* Congregational Society, etc, 13 Gray, 414. But in the absence of a statutory requirement, they are not necessary parties Kaylor *v.* O'Conner, 1 E. D., § 672.

† Barber *v.* Reynolds, 33 Cal., 497.

extent they are always proper parties), still they are not, in the absence of statutory requirements, *necessary* parties to the action.*

It has been held that separate lienors cannot, in the absence of a statutory provision to that effect, unite as plaintiffs, as they have not a joint interest in the subject matter of the suit.†

§ 198. **Parties Plaintiff. Assignees of the Lien.** —Another possible exception to the rules applicable to parties in foreclosure cases arises under some of our statutes in the case of an assignment of the lien after the filing, and before the commencement of the action. It was held under the State Act, where the foreclosure is commenced by the service of a notice instead of the ordinary summons, that the proceeding was not an "action," and therefore not governed by the Code requirement that it should be brought in the name of the real party in interest, but was properly taken in the name of the assignor as plaintiff.‡ This rule is not, however, applicable to the "Cities," and "Kings and Queens" Acts, to which the Code applies; and the question is whether the proceeding can thus be maintained by the assignee. The New York City Act of 1875, provided that "the person filing the claim shall be the plaintiff in such action." This seems to be an express limitation to the original claimant, and the learned author of Crary's Special Proceedings, sitting as referee, nonsuited a plaintiff under this Act on the ground that he was the assignee, and not, therefore, "the person filing the claim." This rule would prevent the assignee for the

* Kaylor *v.* O'Connor, 1 E. D. Smith, 672.

† Bush *v.* Connelly, 33 Ill., 447.

‡ Hallahan *v.* Herbert, 57 N. Y., 409.

benefit of creditors, or the personal representatives of the claimant, from enforcing the lien. To remedy this defect the several Acts of 1880 extended the right to the assignee of the claimant, and so far as they apply, this exception has no force. In the absence of a statutory provision on the subject, there is a difference of opinion as to whether the assignee of the lien may sue in his name. It will be remembered that the right to file a lien is personal to the claimant, and cannot pass by assignment (see *infra*, § 7); the Supreme Court of Illinois extending this rule, holds, that the lien when filed is so far a personal right that the proceedings to enforce it after assignment must be carried on in the name of the assignor;* and there is some authority for this rule in other States.†

§ 130. **Subsequent purchasers; Lis Pendens.**—It is not necessary after the commencement of the action, to bring in subsequent purchasers or encumbrancers, by way of amendment;‡ but the safer practice is to file a *lis pendens*. This is required as a protection against subsequent purchasers in the case of a mortgage foreclosure, and it is difficult to see any difference of principle in the enforcement in the same manner of this statutory charge upon property. The filing of a *lis pendens* was a requirement under the New York City Act of 1875, and is now under the Buffalo City Act of 1880. It has not been customary in this State, except where required by statute, to file a *lis pendens*. It has

* Phœnix Mut. L. Ins. Co. *v.* Patchen, 6 Bradwell, 621.

† Caldwell *v.* Lawrence, 10 Wis. 331; Pearsons *v.* Tincker, 36 Me., 384.

‡ Suydam *v.* Holden, 11 Abb. N. S., 329; Whitney *v.* Higgins, 10 Cal. 547.

been held under the former special proceeding *in rem* to foreclose the lien, that the *lis pendens* is a statutory substitute for an actual seizure, placing the property, pending the litigation, *in quasi custodia legis.**

As the right of personal judgment against parties liable by contract is given, such contractors are proper parties defendant, and even where the proceedings are strictly *in rem*, and the statute does not require the contractor to be brought in as a party defendant, such a course has been held to be proper, if not necessary, so that all the equities might be adjusted in one suit.† The same rule applies to a claimant who furnishes materials to a sub-contractor. He should make all persons in the chain of contracts between him and the owner parties to the foreclosure. But it seems that the failure to make the contractor a party is not such a fatal defect as to make the judgment irregular or void. It is a requirement entirely in the interest of the owner; and if he waives it by failing to take the objection by plea or demurrer, the judgment will stand.‡

§ 206.—THE COMPLAINT.—The Court of Common Pleas, under a former statute, state the requirements of a complaint by a sub-contractor as follows:

"(1.) That labor or materials have been furnished by the plaintiff in the erection of the building in conformity with the contract between the original contractor and the owner. (2.) That within the statutory period, thereafter, a proper notice in writing was filed with

* Poerschke *v.* Kedenburg, 6 Abb. N. S., 172.

† Carney *v.* La Crosse and Milwaukee R. R. Co., 15 Wis. 503; Walkenhorst *v.* Coste, 33 Mo., 401; Clark *v.* Brown, 22 Id., 140; Sullivan *v.* Decker, 1 E. D. S., 697; Wibbing *v.* Powers, 25 Mo., 599.

‡ Horstkotte *v.* Menier, 50 Mo., 158.

the County Clerk. (3.) That then, or subsequently, a payment was due from the owner to the contractor upon the original contract. (4.) That the contracting owner had some interest in the property, at the time of filing the notice. If it be defective in any of these particulars, a motion to dismiss must prevail."* It must affirmatively show that the materials were furnished *for*, as well as used *upon* the building.† That the amount of the lien is due, and payable to the claimant, from the person with whom he contracted, and it is well to aver also the existence of a like indebtedness from the owner to the contractor, and the contractor to the sub-contractor, where the materials are furnished to the latter. On this point there seems to be some difference of opinion. Such a claim is absolutely necessary to have existed at the time of the filing the notice or subsequently, before the commencement of the action.‡ And it is equally true that every fact necessary to constitute a right of lien—all the statutory requirements therefor—must be set up in the complaint and proved on the trial; § as the case cannot be made broader on the trial than that alleged in the pleadings.‖ Following out this view, our courts have in several unreported cases at Special Term, sustained a demurrer to a com-

* Bailey *v.* Johnson, 1 Daly, 61.

† Watrous *v.* Elmendorf, 55 How., 461; Crawfordsville *v.* Brundage, 57 Ind., 262; Same *v.* Lockhart. 58 Id., 477; Shaw *v.* Allen, 24 Wis., 463.

‡ Dun *v.* Parke, 27 Ohio, St. 132; Culver *v.* Elwell, 73 Ill., 536.

§ Skryme *v.* Occidental Mill Co., 8 Helm. (Nev.), 219; Deney *v.* Fifeld, 2 Wis., 73; Thurston *v.* Schroeder, 6 R. I., 272; Sutherland *v.* Ryerson, 24 Ill., 517; Foster *v.* Poillon, 2 E. D. S., 556; Conkright *v.* Thomson, 1 Id., 661; Mason *v.* Heyward, 5 Minn., 74; Bailey *v.* Johnson, 1 Daly, 61.

‖ Hicks *v.* Murray, 43 Cal., 515.

plaint failing to allege affirmatively the existence of a chain of liabilities between the owner and the claimant, on the ground that the lien simply acts as a subrogation of all the contracts between him and the owner; our statutes providing that the owner shall only be held to the extent of his liability on the original contract. A different view, however, is presented by the Court of Common Pleas, in Doughty *v.* Devlin,* and Bailey *v.* Johnson,† to the effect that the averment of an indebtedness from the owner to the contractor at the time of filing the lien, or subsequently, is unnecessary. The statement of the performance of the original contract raises the presumption of a liability for the full amount thereof, casting the onus on the owner of alleging and proving payments. The plaintiff not being bound to negative a possible defence, it is enough to show a *prima facie* right to recover. It would be against all ordinary rules to require the plaintiff to prove on the trial such a negative; and a party is not bound to aver what is unnecessary to prove. If the owner in such case wishes to show that, by the terms of his contract with the original contractor, nothing yet has become payable; or that by reason of payments made by him before the notice of claim was filed, nothing is now due from him, he must set up his defence by answer.

This view of the case receives support also in the case of McMillan *v.* Seneca Lake Grape and Wine Co.,‡ where the plaintiff proved a partial performance of the original contract, and rested without showing specifically any sum due thereon by the owner. This was held

* 1 E. D. S., 635. † 1 Daly, 61. ‡ 5 Hun., 12.

sufficient, for the reason that under the peculiar character of the contract it was *prima facie* evidence of an indebtedness in some amount to the contractor. "The plaintiff having proved the contract by which the defendant agreed to pay eighty per cent of the value of the work as it progressed, and that the contractor had performed it in part, the indebtedness to him appeared, and it was incumbent on the defendant to prove that it had been discharged."

§ 201. **Time of Performance and of Filing the Notice of Claim.**—The complaint must state the character of the contract, whether entire or otherwise, and follow this up by showing the time of the performance, so as to show affirmatively—by the allegation of facts rather than of conclusions,—that the lien was filed in time. This is a statutory requirement, and a failure is fatal to the pleading.*

But it has been held that a liberal construction may be given to the allegations in this respect; thus a statement that "plaintiff furnished the materials between the 6th day of April, 1862, and the 28th day of June, 1862," may be construed to mean that the claimant commenced on the first day named and continued furnishing from time to time up to the last mentioned day, and was sufficient for the purpose of showing that the final furnishing was completed on that day.† It is safer not to run so near the time, but to allege as a fact that it commenced on the first mentioned day and ended on the last one. Having stated the day of the

* Book *v.* Heald, 21 Ill., 425; Jacques *v.* Morris, 2 E. D. S., 639; Willamette *v.* Smith, 1 Oregon, 171. But as to the form of the averment, see Watrous *v.* Elmendorf, 55 How., 461.

† McCrea *v.* Craig, 23 Cal., 522.

completion of the contract, it is necessary to allege the day when the notice was filed.* It is not sufficient, after alleging the performance of the work, to state that within sixty days thereafter the plaintiff filed the notice of claim," etc.; that is a *conclusion* to be gained from the fact of the time of filing, which must be alleged.†

§ 202. **The Notice of Claim.**—It must affirmatively appear that the notice filed contained all the essential provisions prescribed by the statute; that it was proper in form as well as filed in time. This is best shown by annexing to the complaint a copy thereof, and making it a part of the pleading. But it is sufficient if that fact is made to appear in any other manner. Thus on a demurrer to the complaint in the case of Watrous *v.* Elmendorf;‡ the court § states, "The third ground of the demurrer is not, in my opinion, tenable. It was not necessary to set out in the complaint a recital of all that is contained in the claim filed with the County Clerk. The complaint first alleges that 'the claim filed was in the manner and form required by the Act of 1875.' * * It was sufficient to allege generally that the plaintiff had filed the notice mentioned in the sixth section of the Act, without specifying all of the details, which ought to have been stated in the notice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and this is attained,

* Clark & Brown, 22 Mo., 140; Heltzell *v.* Langford, 33 Id., 396; Dallas S. & M. Co. *v.* Wasco Woolen Mills Co., 3 Oregon, 527.

† See Gault *v.* Soldani, 34 Mo., 150. But see Watrous *v.* Elmendorf, *infra post.*

‡ 55 How., 461.

§ Van Hoesen, J.

although the evidence of such fact, to be laid before the jury, be not specifically developed in the pleadings."

§ 203. **The Owner—Description of the Property, etc.** — It is also necessary to state that the person charged in the lien as the owner had an interest in the property at the time of making the contract; and the nature and extent of such interest should be shown.* A simple allegation that he is the *supposed owner* is insufficient.† In regard to the description of the property, the best rule is to make it as full and complete as in the foreclosure of a mortgage. It is usual to copy the description from the records of the deed to the owner, with an allegation that it is the same property referred to in the notice of claim; as the designation in the notice is usually more informal than in the complaint. It may, however, be said of the complaint, as well as of the notice, that if the description is sufficient to enable a party familiar with the locality to identify the premises, to the exclusion of others, with reasonable certainty, it will be sufficient.‡ But as the deed to the purchaser under the foreclosure, must follow the description in the decree of sale, and the latter must follow the complaint, it is always preferable and usually feasible to make the description as full and complete as it would be made in a deed to the fee of the property in question.

§ 204. **Allegations as to the Parties Defendant.**— It is necessary to show sufficient *facts* to connect all the

* Elder *v.* Spinks, 53 Cal., 273; Wilcox *v.* Keith, 3 Oregon, 372; Hawley *v.* Henderson, 34 Miss., 261; Porter *v.* Cooke, 35 Mo., 107.

† Simpson *v.* Dalrymple, 11 Cush., 308.

‡ Duffy *v.* McManus, 4 Abb., 432, and see Philips on Liens, § 379, and cases cited.

parties defendant with the subject matter of the litigation in such a manner as to make them *prima facie*, proper parties to the action; and where they claim an interest in the property, it is preferable, if not requisite, to show what that interest is claimed to be. In fact the Supreme Court has held that if *any* person other than the owner is made defendant, the complaint *must* show what interest he has in the premises;* and the same principle is substantially held by the Court of Common Pleas.†

The case of Jenks *v.* Parsons‡ is illustrative of the requirements of a complaint in this respect. The action was brought to enforce a mechanic's lien, filed against the defendant, S. M. Parsons, who is alleged to be the owner of the premises, and the defendant, Edward K. Robins, who is alleged to have built houses thereon by permission of the said owner. The complaint then alleges that Charles H. Parsons has, or claims to have some interest in said premises as owner thereof; and that at the time of filing said notice of lien, he was under a contract with the defendant, Samuel M. Parsons, to convey said interest to the said Samuel M. Parsons or his legal representatives, and asks that Charles H. Parsons be enjoined from conveying his interest in the premises until the further order of the Court, and that the purchaser at the sale, under the judgment in this action, be entitled to a specific performance of the contract made by the said Charles H. with Samuel M. Parsons. Upon a demurrer, interposed by the defendant Charles H. Parsons the Supreme Court held, that the

* Jenks *v.* Parsons, 2 Hun, 667.

† Sinclair *v.* Fitch, 3 E. D. Smith, 677.

‡ 2 Hun.

complaint did not, as to him, state facts sufficient to constitute a cause of action. That the complaint should have alleged not only a legal contract to convey, but facts entitling the grantee to a deed under it; such a performance or readiness to perform its condition.

Where other lienors are made parties defendant and it is desired to have the Court pass upon their respective rights and priorities, they should be designated as mechanics' lien claimants; and it is usual to set forth in order of filing the statement of all the nominal liens of this nature against the property, giving the date of filing, name of claimant and amount claimed in each case. And where prior to the filing of the notice of claim a deed or encumbrance upon the property is claimed to be fraudulent or voidable, and it is desired to remove the cloud from the title, the persons affected thereby should be made parties, and allegations showing the character and extent of their claim should be inserted, sufficient in form to put them on the defence, as to their rights in or to the property.

§ 205. **The Service of Summons—Notice of no Personal Claim.**—The summons may be served, and the affidavit of service made, the same as in the foreclosure of a mortgage. The complaint need not be served with the summons, but, where no personal claim is made against any of the defendants, there should be attached to the summons served upon them the usual notice of the object of the action, accompanied with the statement that no personal claim is made.

FORM No. 2

NOTICE OF OBJECT OF ACTION.

COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

A. A.,
Plaintiff,
against
B. B., C. C., D. D., and E. E.,
Defendants.

To D. D.:

Take notice that the object of the above action, in which a summons is herewith served upon you, heretofore acquired by the claimant, under the act of May 17th, 1875, is to foreclose a mechanics' lien in which the plaintiff is claimant, and the defendant, B. B., is named as owner and debtor. That a notice of the plaintiff's claim was duly filed in the office of the County Clerk, of the City and County of New York, on the 1*st* day of *July*, in the year one thousand eight hundred and seventy-*five*, at 11 o'clock in the *forenoon*, for the sum of *one thousand* dollars, with interest from the 20*th* day of *June*, 1875, upon the following described premises, viz.:

[Insert the description, the same as in complaint.]

And, also, take notice that no personal claim is made against you.

Dated New York, *May* 10, 1875.

S. F. KNEELAND,
Pl'ff's Att'y.

FORM NO. 3.—NOTICE OF LIS PENDENS.

§ 206. **The Lis Pendens.**—As soon as the action is commenced, by the service or issuing of the summons, a *lis pendens* should be filed with the County Clerk, and entry of that fact made upon the lien-docket. The practitioner should see that the entry is made in due form, and the *lis pendens* filed in the proper manner, and as of the right day and hour. Without it is properly filed and entered, within ninety days from the filing of the claim, the lien will be discharged by lapse of time.

FORM No. 3.

Notice of Lis Pendens.

COURT OF COMMON PLEAS IN AND FOR THE CITY AND COUNTY OF NEW YORK.

A. A., *Plaintiff*,
against
B. B., C. C., D. D., and E. E., *Defendants.*

Notice is hereby given that an action has been commenced, and is pending in this Court, upon a complaint of the above-named *plaintiff*, against the above-named *defendants*, for the foreclosure of a mechanics' lien, upon the property hereinafter described. That

a notice of the plaintiff's claim was duly filed with the County Clerk of the City and County of New York, on the *20th* day of *September*, in the year one thousand eight hundred and seventy-*five*, at 11.30 o'clock in the *forenoon;* and that the premises affected by the said lien were then (and still are) owned by the defendant, B. B., and situated in the *Tenth* ward of the City of New York, and bounded and described as follows, to wit:

[Insert description the same as in the complaint.]

S. F. KNEELAND,
Plaintiff's Attorney.

§ 207. **The Complaint.**—The next duty of the plaintiff's attorney is to draft and file the complaint, and to serve a copy thereof in the usual manner upon all who appear and demand it. The practice must in every respect conform to that of an ordinary foreclosure, except where the statute has laid down a different rule.

FORM No. 4.

COMPLAINT BY SUB-CONTRACTOR.

COURT OF COMMON PLEAS, IN AND FOR THE CITY AND COUNTY OF NEW YORK.

A. A.,

Plaintiff,

against

B. B., C. C., D. D., and E. E.,

Defendants.

The complaint of the above-named *plaintiff*, who appears herein by S. F. Kneeland, *his* attorney, shows:

FIRST. On or about the 27*th* day of *July*, 1875, a contract or agreement was duly made between the said *plaintiff* and the said defendant, C. C., whereby the plaintiff agreed to do all the *plastering* to the three houses erected on the premises hereinafter described, and to furnish all the materials and labor necessary to do the said *plastering*, and that said *plaintiff* was to receive from said defendant, C. C., for said *plastering*, labor, and materials, and the said C. C. agreed to pay the plaintiff therefor, the sum of *fifteen hundred* dollars to be paid as follows, to wit:

FORM NO. 4.—COMPLAINT BY SUB-CONTRACTOR.

The sum of *six hundred* dollars when the *brown mortar is all on;* the sum of *seven hundred* dollars when the *white mortar* is all on, and the further sum of *two hundred* dollars when all is finished; as appears by the said contract, a copy of which is hereto annexed, marked "Exhibit Number 1," and forms a part of this complaint.

SECOND. That in pursuance of said contract or agreement the said plaintiff at various times between the 26*th* day of *July*, 1875, and the 20*th* day of *September*, 1875, did and performed the said *plastering* on the said houses on the said premises and did furnish all the necessary labor and materials for said *plastering* on or about the said houses, and that both the *brown mortar* and the *white mortar* were all on the said houses on the 18*th* day of *September*, 1875.

THIRD. That the said defendant, C. C., has paid the sum of *six hundred* dollars on account of said contract and for said labor and materials, and that the sum of *seven hundred* dollars is still due and owing to the plaintiff on said contract, together with interest thereon from *September* 20, 1875, which said last-mentioned sum and interest the said defendant, C. C., has since wholly neglected and refused to pay.

FOURTH. The premises aforesaid are known as Numbers 171, 173, and 175 *West Twenty sixth* Street, in the City and State of New York, and are described as follows:

All that certain piece or parcel of land lying and being in the *Tenth Ward* of the City of New York, and bounded and described as follows, viz.: Beginning at

a point," etc. [Insert full description by metes and bounds.]

FIFTH. That as plaintiff has been informed and verily believes, the said defendant, B. B., was, on the said 27*th* day of *July*, 1875, and on the 20*th* day of *September*, 1875, and at the time of the lien hereinafter mentioned, the owner of the said houses, premises, and appurtenances, and seized of an estate in fee simple therein.

SIXTH. That the said defendant, C. C., was, at the times aforesaid, the contractor of the said defendant, B. B., for the erection of the said buildings; and that the work performed and materials furnished by the plaintiff under the contract hereinbefore mentioned was done and furnished at the instance of the said B. B., and in pursuance of and in conformity with the original contract between the said B. B. and the said C. C., for the erection of said buildings, and this plaintiff further shows, on information and belief, that at the time of the filing of the lien hereinafter mentioned, there was due to C. C., the said contractor, from B. B., the said owner, a sum of money more than sufficient, out of the portion legally applicable thereto, to pay the claim and lien of the plaintiff herein set forth in full.

SEVENTH. That on the 20*th* day of *September*, 1875, and *before the completion* of the said original contract, and within thirty days from the completion of the work and the furnishing of the materials for which this claim is made, the plaintiff duly filed with the County Clerk of the City and County of New York, a claim in the manner and form required and designated

FORM NO. 4.—COMPLAINT BY SUB-CONTRACTOR.

for the perfection of a mechanics' lien, under the act entitled "An Act to define and limit the Liens of Contractors and others upon Real Estate, in the City and County of New York, and to provide for the Enforcement thereof," passed May 17th, 1875; that a copy of said claim or notice of lien is hereunto annexed, marked "Exhibit No. 2," and forms a part of this complaint; and that this action is brought to enforce the said claim against the property therein designated, and hereinbefore more particularly bounded and described.

EIGHTH. That neither the said lien nor the claim on which the same is founded has been paid, waived, satisfied, or discharged, and that no other proceedings at law or in equity have been commenced for the foreclosure of said lien, or the recovery of the amount of the said money.*

NINTH. That each of the defendants C. C., D. D., and E. E., have, or claimed to have, some interest in or lien upon said premises, or some part thereof, but which interest or lien, if any has accrued, plaintiff claims and insists is subsequent in time and inferior in rank, class, and order of payment to the claim and lien of this plaintiff.

Wherefore, this plaintiff demands that the said claim be adjudged a lien upon the said *buildings*, and the *lots* of land hereinbefore described, upon which the same *were* constructed, and the appurtenances thereto, as of the date of the filing of said claim, to wit: On the 20th day of September, 1875; that the amount of

* These averments are not essential.

FORM NO. 4.—COMPLAINT BY SUB-CONTRACTOR.

said claim, to wit; the sum of *seven hundred* dollars, together with the interest thereon from the 20*th* day of *September*, 1875, be adjudged to be due from the said C. C. to this plaintiff;* that the defendants and all persons claiming under them subsequent to the commencement of this action, be barred and foreclosed of all right, claim, lien, and equity of redemption in said premises; that the said premises may be decreed to be sold according to law; that out of the moneys arising from the sale thereof, the plaintiff may be paid the amount due on the said claim and lien, with interest from the 20th day of September to the time of such payment, and the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendant C. C. be adjudged to pay any deficiency which may remain, after applying all of said moneys so applicable thereto, and that judgment may be docketed against the said C. C., for the amount of such deficiency; and that the plaintiff may have such other and further relief, or both in the premises as shall be just and equitable.

S. F. KNEELAND,
Plaintiff's Attorney.

City and County of New York, ss.

A. A. being duly sworn says, that he is the plaintiff in the above entitled action, that the foregoing complaint is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me, }
this 1st day of November, 1875. }

NOTE A.—Where the owner transfers the title, after the commencement of the work and before the filing of the notice of claim, the interest of the owner, at the time of the *commencement of the* work, instead of the *filing of the lien may* be sold, under the provisions of Sections one and three. In that case the sixth paragraph and the demand for relief should be changed accordingly.

§ 208. Another Mode of Stating the Claim.—The following form contains all the requisites of the statute, but is somewhat different in the order of statement from the preceding one. Any method is sufficient that embodies the facts of the case and the requirements of the statute.

FORM No. 5.

COMPLAINT BY SUB-CONTRACTOR AGAINST THE OWNER AND CONTRACTOR.

NEW YORK COMMON PLEAS.

A. A., *Plaintiff*,

against

C. C. & B. B., *Defendants*.

A. A., plaintiff, complains of the defendants, and, for a cause of action, alleges:

FORM NO. 5.—COMPLAINT BY SUB-CONTRACTOR.

First. That on or about the 5th day of July, 1874, the defendant C. C. made and entered into a contract with the defendant B. B., whereby the said C. C. agreed to furnish and provide all the carpenter work and materials necessary or proper in, toward, or about the erection of a new house on East Forty-second Street, in the 19th Ward of the city of New York, according to certain plans and specifications, also signed by the parties and made part of the said contract, together with all other kinds of work and material mentioned in said specifications under the head of or as part of the carpenter work or materials, and such other kinds of work and materials as should be necessary to or are usually performed or furnished in connection with carpenter work, materials, and perform and finish all other matters and things necessary or usual in the premises, for the sum of twelve thousand four hundred and fifty dollars, to be paid in installments, as the work progressed, as more particularly stated and set out in the said contract; and it was in and by the said contract agreed that the defendant B. B. should pay for such work and materials the said sum of twelve thousand four hundred and fifty dollars, in installments as aforesaid.

Second. And plaintiff avers that the said C. C. did fully perform and complete his said contract and became entitled to demand, receive, and be paid the several installments therein mentioned and the whole sum therein specified to be paid to him, and that there is due and unpaid to him upon the said contract, as plaintiff has been informed and believes, the sum of ten thousand dollars or thereabouts, and more than

sufficient to cover the amount of the lien of the plaintiff hereinafter mentioned, together with all prior liens thereon.

Third. And the plaintiff further shows, that on or about the 1st day of September, 1874, he made and entered into a contract or agreement with the said C. C., whereby he agreed to furnish the sash and glass, and do the glazing for the said building, according to, and in pursuance of the contract of said C. C., for the carpenters' work of the building as above mentioned, for certain prices agreed upon between the plaintiff and the said C. C. to be paid to him by said C. C. therefor, amounting in the whole to about one thousand dollars. And plaintiff shows, that the bill of particulars hereto annexed, marked "Exhibit A," is for a part of the work and materials which he so agreed to furnish, and is for a part of the same work and materials, and at the same price as stipulated for in his said agreement with said C. C.

Fourth. And plaintiff further shows, that in pursuance of and in conformity with the said contract of said C. C. for the carpenter work of said building as aforesaid, and in pursuance of and in conformity with his contract or agreement with said C. C., above mentioned, he did certain work and furnished materials for the said building, that is to say, he furnished the sashes and glass and glazed doors which were put into and used in the construction and erection, and the finishing of the said building from the 5th of December, 1874, up to the 27th of April, 1875, amounting to seven hundred dollars, a bill of particulars of which work and materials is hereto annexed. And plaintiff

shows, that on the said 27th day of April, 1874, the said sum of seven hundred dollars was due and owing from said C. C. to this plaintiff for such work done and materials furnished as aforesaid, and that the said C. C. has not yet paid the same, or any part thereof.

Fifth. That on the 17th day of May, 1875, and within thirty days after completing such work and furnishing such materials, the said sum of $700 being so due and unpaid, the plaintiff, pursuant to the statute of this State, entitled "An Act to define and limit the Liens of Contractors and others upon Real Estate in the City and County of New York," passed May 17, 1875, duly served upon the Clerk of the City and County of New York, and filed in his office a notice of claim upon the said building and the lots of land upon which it stands, for the said sum of $700 so due as aforesaid, which notice of lien was in writing and duly verified, and in and by which the plaintiff was specified and described as claimant, and the said C. C. as contractor, and the defendant B. B. as owner, and describing the building as situated in the 19th Ward of the City of New York, on the south side of Forty-second Street between the Second and Third Avenues, commencing 130 feet south from Third Avenue, there being at that time no street numbers to the lots and buildings. And this plaintiff insists that he thereby acquired a good and valid lien upon the said building and the lots of land upon which it stands, for the said sum of $700, and interest from the 27th day of April, 1875, and for the cost of fore closing the same.

Sixth. That the building and lot of land on which

it stands and on which the plaintiff claims said lien, are situated in the 19th Ward of the City of New York, on the southerly side of Forty-second Street, between Second and Third Avenues, commencing 130 feet east of Third Avenue, and now known by the street numbers 136, 138, and 140 of said street, and is bounded and described as follows [insert description].

Seventh. That at the time of furnishing the sashes and glass, and doing the work as aforesaid, and at the time of serving and filing said notice of lien, the legal title to the lot of land upon which the building stands, including the building, is in the defendant B. B., who was at the several towns hereinbefore mentioned, and still is the owner of the said building and of the lot of land over which it stands—so as to be the proper parties against whom such claim under the above mentioned lien law should be made.

Eighth. That there was justly due from the said C. C., at the time of filing said notice of lien, the whole sum of $700 as claimed in said notice, and the whole of said sum is still due and unpaid.

Wherefore, the plaintiff demands a judgment that it be adjudged that there is due to the said C. C., under the contract above mentioned for the carpenter work of the said house, the sum of $10,000, or that the amount so due may be determined and adjudged. Also, that it may be adjudged that the said C. C. is indebted to the plaintiff for the work and materials included in the lien herein, sought to be foreclosed, the sum of $700, and interest from the 27th day of April, 1875. And also, that it be adjudged that the plaintiff has a good and valid lien upon the building

and lot of land on which it stands for the said sum of $700, and interest from April 27, 1875, and the costs of foreclosing the same, and that the defendants and all persons claiming under them subsequent to the commencement of this action, be barred and foreclosed of all right, claim, lien, and equity, in said premises, and that the right, title, and interest of the said B. B., which he had at the time of filing the plaintiff's notice of lien, be sold as may be directed by the Court, and that the proceeds of such sale be applied to the payment of the costs of proceedings, and of the amount found due to the plaintiff, and that the residue of such proceeds be paid to the Clerk of the City and County of New York, to abide the further order of the Court, and that if the amount applicable thereto shall not be sufficient to pay the claim of the plaintiff in full, that the defendant C. C. be adjudged to pay any deficiency which may remain, and that judgment be docketed against the said C. C. for the amount of such deficiency, and for such other and further relief in the premises as shall be just and equitable.

JOHN SHARP,

Att'y for Plaintiff.

City and County of New York, ss.:

A. A., the plaintiff herein, being duly sworn, says: That the above complaint subscribed by him is true of his own knowledge, except as to the matters therein

FORM NO. 5.—BILL OF PARTICULARS.

stated on information and belief, and as to those matters he believes them to be true. A. A.

Sworn to before me, this 26th day of September, 1875.

JOHN JONES,
Notary Public.

BILL OF PARTICULARS.

"EXHIBIT A."

"The following is the bill of particulars referred to in the complaint annexed. [Insert the items of the claim in the usual form].

FORM No. 6.

§ 209.—Complaint by Contractor.

COURT OF COMMON PLEAS, IN AND FOR THE CITY AND COUNTY OF NEW YORK.

C. C., *Plaintiff*,
against
B. B., D. D., E. E., and F. F., *Defendants*.

The complaint of the above-named *plaintiff*, who appears herein by Louis Hessberg *his* attorney, *shows:*

First. That at the City of New York, between the 10*th* day of *May* and the 20*th* day of *June*, 1875, the *plaintiff*, at the special instance and request of the defendant, B. B., performed labor upon and furnished materials to be used in the construction of a certain building erected on the premises hereinafter described. That said labor and materials were reasonably worth the sum of *fifteen hundred* dollars, which sum, the said defendant, B. B., undertook and promised to pay the plaintiff therefor, but that he has not paid the same, nor any part thereof, excepting the sum of *five hundred* dollars, leaving a balance of *one thousand* dollars still due and owing to the plaintiff thereon.

Second. That the premises, aforesaid, is situated on the *southerly* side of *West Eighteenth* Street, in the City

of New York, between the *Fifth* and *Sixth* Avenues, and is known as Number 34 *West Eighteenth* Street, and is bounded and described as follows: "All that certain piece or parcel of land lying and being in the *Tenth* Ward of the City of New York, beginning at a point on the *southerly* side of *Eighteenth* Street," etc. [Insert full description.]

THIRD. That at the several times hereinbefore mentioned, and, also, at the time of the filing of the claim next hereinafter specified, the *defendant*, B. B., was, and still is, the owner in fee of the above-described premises.

FOURTH. [Conclude with the Form No. 4, from the 7th paragraph, which corresponds to the fourth one in this form. In the prayer, the name of the owner, B. B., must be substituted for that of C. C., the contractor.]

§ 210. **Complaint by Several Claimants.**—Section twelve of the Act of 1875, provided that "any number of persons, claiming liens upon the same property may join in the same action." In such case the following form may be used:

FORM No. 7.

Complaint by Several Claimants.

SUPREME COURT, COUNTY OF NEW YORK.

A. A., D. D., and E. E.,
Plaintiffs,
against
B. B., and C. C.,
Defendants.

The above-named plaintiffs, appearing by Bushnell & Albright, their attorneys, complain of the defendants, and for a cause of action allege:

First. [Here insert the terms of the original contract, as in the first paragraph of the complaint, in Form No. 4.]

Second. And plaintiffs aver that the said C. C. fully performed and completed his said contract and became entitled to demand, receive, and be paid the several installments therein mentioned, and the whole sum therein specified to be paid by him. And that there was due and unpaid, upon the said contract, at the time of the filing of each of the several claims, hereinafter specified, as plaintiffs are informed and verily believe, the sum of *ten thousand* dollars, and more than sufficient for the payment of the said claims, together with all prior liens thereon, if any, in full.

Third. And these plaintiffs further show that, on

FORM NO. 7.—COMPLAINT BY SEVERAL CLAIMANTS.

or about the *first* day of *April*, 1875, the defendant C. C., entered into a separate contract with each of them, for the performance of carpenter work, included in said original contract, hereinbefore mentioned. That the said C. C., then and there, agreed to pay each of these plaintiffs the sum of three dollars per day for each day's work performed by them, as aforesaid. That between the said first day of April and the first day of June, next thereafter, the plaintiffs, under said agreement, performed labor for the time and of the value as follows, to wit: The said A. A. performed *twenty-five* days of work, and, thereupon, became entitled to receive from the said C. C. the sum of *seventy-five* dollars. That the said D. D. performed *twenty* days of work, and, thereupon, became entitled to receive from the said C. C. the sum of *sixty* dollars. And that the said E. E. performed *twenty-six* days of work, and, thereupon, became entitled to receive from the said C. C. the sum of *seventy-eight* dollars. That the said C. C. heretofore promised to pay the said plaintiffs the amount due to each of them respectively, as aforesaid, but that he has not paid the same nor any part thereof. That all of said labor was performed upon the premises, hereinafter described, at the instance of the said B. B., and in pursuance with the terms of the contract herein first mentioned.

FOURTH. Plaintiffs further show that in pursuance with the terms of the statute of this State, entitled "An Act to define and limit the Liens of Contractors and others upon Real Estate in the City and County of New York," passed May 17, 1875, each of the said plaintiffs, within thirty days respectively, after

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the completion of such work, filed with the County Clerk of the County of New York, a claim against the said B. B. as owner, and the said C. C. as contractor, at the time and for the amount as follows, to wit:

The said A. A. filed with the County Clerk on the 10*th* day of *June*, 1875, a claim for the sum of *seventy-five* dollars; the form and contents of which claim will more fully appear from a copy thereof hereunto annexed, marked "Schedule A," which forms a part of this complaint.

That the said D. D. filed in like manner on the 12*th* day of *June*, 1875, a claim for the sum of *seventy* dollars; the form and contents of which claim will more fully appear from a copy thereof hereunto annexed, marked "Schedule B," which forms a part of this complaint.

That the said E. E. filed in like manner, on the 15*th* day of *June*, 1875, a claim for the sum of *seventy-eight* dollars; the form and contents of which claim will more fully appear from a copy thereof hereunto annexed, marked "Schedule C," which forms a part of this complaint.

And the said plaintiffs insist that each of them acquired a valid lien for the amount specified in their several claims, and for the interest thereon and the costs of this suit upon the said building, and the lot of land upon which the same stands, together with the appurtenances thereto belonging.

FIFTH. That the building upon which the said work was performed, and against which the said claims are filed, and the lot of land on which the same stands, is situated on the *southerly* side of *Forty-*

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second Street, in the City of New York, between the Second and Third Avenues, and is known and distinguished by the street number as *No.* 140 *West Forty-second* Street, and is bounded and described as follows, to wit. (State metes and bounds as in the foreclosure of a mortgage.)

SIXTH. That at the several times hereinbefore mentioned, the defendant was and still is, as the plaintiffs are informed and verily believe the owner in fee of the premises next hereinbefore described, and is properly chargeable as owner, under and in pursuance of the provisions of the act hereinbefore mentioned.

Wherefore, plaintiffs pray that it be adjudged that there is due from the defendant B. B. to the defendant C. C., the sum of *ten thousand* dollars, or that, if less, the amount so due as aforesaid be determined and adjudged; and that it be adjudged that the defendant C. C. is indebted to the plaintiff A. A. in the sum of seventy-five dollars, and to the defendant D. D. in the sum of seventy dollars, and to the defendant E. E. in the sum of seventy-eight dollars, with interest on each claim from its date, and that each of said defendants has a valid lien upon said premises for the amounts, and in the rank and order of payment last hereinbefore specified, and that the defendants and all persons claiming under them subsequent to the commencement of this action, be barred and foreclosed of all right, claim, lien, and equity in said premises, and that the right, title, and interest of the said B. B., which he had on the 10th day of June, 1875, be sold according to law, and the proceeds thereof brought into court, and applied, first to the payment of the costs

of this action, and then to the satisfaction of the amount found due to the said A. A., D. D., and E. E. in the order named, and that if the amount applicable thereto will not pay the said several claims in full, then that each plaintiff whose claim is not fully satisfied thereby, shall be authorized to docket a judgment against the said C. C. for the amount of the deficiency remaining unpaid as aforesaid; and for such other and further relief in the premises as shall be just and equitable.

BUSHNELL & ALBRIGHT,
Plaintiff's Attorneys.

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§ 211.—FORM No. 8.

Complaint on Contract for Delivery of Property.

Where the contract specifies that the owner shall make his payments in a special manner, as for instance, by the delivery of notes, mortgages, or specific personal property, under the provisions of Section sixteen, of the Act of 1875; the form may be the same as in number four, except that the seventh paragraph, in relation to the contract with the owner, should be amended by inserting at the end a clause to the effect following, viz.:

"That by the terms of the said original contract, the said C. C. was to receive from the said B. B., a *bond and mortgage* to be executed upon, and cover the house and lot known as No. 456 Broadway, in said city of New York, conditioned for the payment by the said B. B., in three years from the date thereof, to

wit from the time of said completion, of the full amount of the contract price then remaining due and unpaid. That at the time of the filing of the claim by the plaintiff as aforesaid, the said original contract was completed, and a large sum of money was due thereon to the said C. C. as aforesaid. But that the said B. B. wholly neglects either to pay the same or to execute said mortgage."

The prayer for relief should be amended by inserting, at the place designated in Number 4 by a *, the following or a similar clause, "that the said B. B. be directed by the Court to execute, within twenty days from the entry of the decree herein, to the defendant C. C., in trust for the payment of the plaintiff's claim, and all other liens, if any, founded upon or under said original contract, a mortgage upon the house and lot known as No. 456 Broadway, in the city of New York, conditioned for the payment by the said B. B., in three years from the date thereof, the full sum or amount due upon or on account of said original contract, together with interest thereon at seven per cent. semi-annually. And that such mortgage be thereupon sold at public sale, and the proceeds brought into court, and distributed or paid out in the manner hereinafter specified for the application of the proceeds of the sale of the premises charged with the plaintiff's lien herein. And that upon a default on the part of the said B. B., to execute and deliver such mortgage in the manner and form, and within the time aforesaid."

§ 212. **Proceedings by the Owner and Defendant—The Notice of Appearance.**—Default is hardly ever taken in mechanics' lien cases. The proceedings in

such a case, however, will be set forth hereafter. On receipt of the summons for relief by the owner, he puts in a notice of appearance the same as in an ordinary action.

FORM No. 9.

NOTICE OF APPEARANCE.

COURT OF COMMON PLEAS.

A. A., *Plaintiff*,
against
B. B. & C. C., *Defendants*.

To S. F. Kneeland, Plaintiff's Att'y:

Take notice that I appear as attorney for the defendant B. B., and demand that a copy of the complaint, and all other papers herein be sent to me at my office, No. 18 Wall Street, in the city of New York.

JOHN SHARP, Jr.
Att'y for Deft. B. B.

Dated, N. Y., Aug. 1, 1875.

§ 213. **The Answer.**—The answer is governed by the same general rules that apply to ordinary answers under the code. Any defense to the plaintiff's claim,

or to the validity and extent of the lien, or the defendant's ownership of the premises at the time when the lien was charged thereon, and any plea in abatement available in a foreclosure suit, is proper in these proceedings. In short, any fact which tends to affect the right of the plaintiff to the relief as demanded in the complaint, so far as such demand affects the owner, and any circumstance connected with the case that it is important for the Court to know, in order to protect the interests of the owner, should be pleaded by him. The following answer, applicable to the complaint set forth in Form No. 5, may be used as a skeleton frame in drafting a plea under this act. And see, also, the form of answer under the State Act in Chapter XVI.

FORM No. 10.

OWNER'S ANSWER TO COMPLAINT BY SUB-CONTRACTOR.

NEW YORK COMMON PLEAS.

A. A.,
Plaintiff,
agst.
B. B. and C. C.,
Defendants.

The separate answer of the defendant B. B., to the complaint herein, respectfully shows:

FORM NO. 10.—ANSWER BY OWNER.

First. The defendant admits that on or about the day mentioned in the said complaint, the said defendant C. C., made and entered into a contract with this defendant, for the end and purpose in the said complaint mentioned, and that said contract, and the plans and specifications in the complaint mentioned, were approved and accepted by this defendant, and that said contract contains some of the provisions in said complaint alleged, but avers that some of the provisions thereof are not accurately or completely stated in said complaint, and for greater certainty as to the provisions of the said contract, these defendants have annexed hereto a copy of the said contract, marked A, which they pray may be taken as a part of this their answer; and he admits the allegations in the said complaint contained, as to the provisions of the said contract, so far as such allegations conform to, or agree with the provisions contained in said contract hereto annexed, and in so far as such allegations differ from the provisions in the said contract contained, he denies the said allegations.

Denial of Performance by Contractor.

Second. And this defendant further answering, denies that the said C. C. did fully perform or complete his said contract, or that he became entitled to demand or receive, or be paid the several installments in said contract mentioned, or the whole sum therein specified to be paid to him, or that there is due or unpaid to him upon said contract the sum in said complaint mentioned, or more than sufficient to cover the amount of

the alleged lien of the plaintiff, or the prior alleged liens, or any sum or amount whatever.

Denial of Contract with Sub-Contractor.

Third. And this defendant further answering, avers, that he has no knowledge or information sufficient to form a belief, whether the plaintiff, on or about the first day of September, 1874, or at any time whatever, made or entered into any contract with the said C. C., whereby he agreed to furnish any sash or glass, or to do any glazing or any other work in pursuance of the said contract of said C. C., or otherwise, for the prices agreed upon by the said C. C., or otherwise, amounting in the whole to about $1,000, or for any prices or sums whatever, as alleged in said complaint or otherwise, or whether the bill of particulars annexed to said complaint is for any part of said alleged work or materials, or is at the prices stipulated in said alleged agreement with said C.C., and he leaves the plaintiff to make such proof of the allegations in respect thereto, in said complaint contained, as he may be advised.

Denial of Performance by Sub-Contractor.

Fourth. And this defendant avers that he has no knowledge or information sufficient to form a belief, whether the said plaintiff in pursuance of, or in conformity with the said contract of said C. C., with said B. B., or in pursuance of or in conformity with the plaintiff's said alleged contract with the said C. C., or of any contract or agreement whatever, did any work or furnished any materials for the building in said complaint mentioned, or furnished any sashes or glass, or glazed

doors, or other articles, which were put into or used in the construction or erection, or finishing of said building, or elsewhere, during the time in said complaint mentioned, or any other period, amounting to $700, or any other sum whatever, nor whether the bill of particulars of such work or materials annexed to said complaint is a correct account thereof, and he leaves the said plaintiff to make such proof of the allegation in respect thereto in said complaint contained, as he may be advised.

Denial of Contractors' Indebtedness.

Fifth. This defendant has no knowledge or information sufficient to form a belief, whether on the 27th day of April, 1875, or on any other day, the said sum of $700, or any other sum, was due from said C. C. to said plaintiff, for said alleged work or materials or otherwise, nor whether the said C. C. has not paid the same, nor any part thereof, as alleged in said complaint, and they leave the said plaintiff to make such proof of the allegations in respect thereto in said complaint contained as he may be advised.

Denial of the Validity of the Lien.

Sixth. This defendant further answering, admits that on or about the 17th day of May, 1875, the plaintiff did, as in said complaint stated, file with the Clerk of the City and County of New York, a notice of lien upon the said building and lots of ground for the sum of $700, as alleged in said complaint, and that the description of the parties and of the premises was as therein mentioned, but he has no knowledge or information

sufficient to form a belief, whether the said filing was within thirty days after the completion of such alleged work, or the furnishing of such alleged materials, or whether the same was duly made in accordance with the statute in such case made and provided, nor whether at the time of said filing the sum of $700 was due or unpaid, as alleged in said complaint, but this defendant denies that the said plaintiff thereby acquired a good or valid lien, or any lien whatever upon the said building or lots of land upon which said building stands or either of them, for the sum of $700, or interest, or for the costs of foreclosing said alleged lien, or for any sum whatever, as alleged in said complaint or otherwise.

Denial of Ownership.

Seventh. This defendant further answering, admits that the premises on which the said plaintiff claims a lien are situated as described in said complaint, but avers that he was not, at any of the times in said complaint mentioned, nor is he now, the owner of the building referred to in the said complaint.

General Denial.

Eighth. And this defendant further answering, denies each and every allegation in said complaint contained not hereinbefore specifically admitted or denied.

Waiver—under Original Contract.

Ninth. And this defendant further answering, avers that on or about the 9th day of May, 1874, the defendant made and entered into the contract hereto

annexed, marked A, being the contract referred to in the complaint, and that the said contract contains the following stipulation and provisi n :

"*Section Fifth.*—That the parties of the second part will not at any time suffer or permit any lien, attachment, or other encumbrance under any law of this State, or otherwise, by any person or persons whomsoever, to be put or remain on the building or premises, into or upon which any work is done or materials are furnished under this contract, for such work or materials, or by reason of any other claim or demand against the said party of the second part, and that any such lien, attachment, or other encumbrance, until it is removed, shall preclude any and all claim and demand for any payment whatever under and by virtue of this contract."

And in and by said contract, it is also provided as follows: "Provided, however, that no payment shall be made until the certificate of the architect shall first be obtained, that the payment is due, and the last payment shall not be made until, in addition to such certificate, there shall also be had and obtained a certificate of the County Clerk that no lien has been filed in his office," etc.

Tenth. And this defendant further answering, avers and insists, that the filing of the notice of lien by the plaintiff herein mentioned and referred to in the said complaint, is, under the provisions and terms of the fifth section or paragraph of the said contract hereinbefore set forth, a bar to, and waiver of any claim on the part of the said contractor, C. C., or of any one claiming under him, or of the plaintiff in this action, to

have or claim, or demand any payment whatever, *under* or by virtue of the contract aforesaid, and that until the lien alleged to have been acquired by the said plaintiff has been removed, nothing is due or can become due to the said C. C. under said contract.

Eleventh. And this defendant further answering, avers that no certificate of the Clerk of the City and County of New York, certifying that no lien has been filed in his office has ever been procured by the defendant C. C., as required by said contract, and he avers and insists that the obtaining and filing of said certificate of said County Clerk, by the said contractor, C. C., is a condition precedent under the terms of said contract, to the right of the said C. C., or of any one claiming under or through him, to demand the last payment or installment under the said contract, and they therefore aver that the said last installment has never become due to the said C. C.

Allegation as to other Liens.

Twelfth. And this defendant further answering, avers upon information and belief, that besides the alleged lien of the plaintiff, the following liens upon the building aforesaid were filed in the office of the Clerk of the City and County of New York, by the following named persons and parties, who had furnished work, and performed labor and services in and about the performance of the contract aforesaid, and which materials, or some part thereof, were used for, and labor performed upon the said building, to wit:

One lien was filed as aforesaid, by John Doe, for $333, December 6, 1874.

One lien was filed as aforesaid, by Ambrose Brown, for $50, on 31st March, 1875.

One lien was filed as aforesaid, by Stephen Thompson, for $64.75, on 31st March, 1875.

One lien was filed as aforesaid, by John Tracy, for $35.17, on 31st March, 1875.

One lien was filed as aforesaid, by Richard Roe, for $40, on 31st March, 1875.

One lien was filed as aforesaid, by John White, for $1,000, on 26th May, 1875.

And these defendants aver and insist, that the said liens, or some of them, were, as these defendants are informed and believe, still standing upon the docket of liens in the office of the Clerk of the City and County of New York, as subsisting on and upon the building mentioned in the said contract at the time of the commencement of these proceedings; and they further aver and insist, that under the provisions of the fifth paragraph of the contract aforesaid, the said C. C. and all persons claiming under or through him, are precluded and barred from claiming or demanding any payment whatever under or by virtue of the said contract, or for any work done, or materials furnished thereunder, until the said liens, and each of them, have been removed; and they aver, that in consequence of the filing and subsistence of the said liens as aforesaid, there was nothing due to the said C. C. under the said contract, at the time of the commencement of these proceedings.

Abandonment by Contractor.

Twelfth. And this defendant, further answering,

alleges that the said defendant, C. C., never performed the conditions or covenants in the said contract between him and this defendant contracted, covenanted, and agreed to be performed by him, nor completed or finished the said work on said building, nor complied with the terms of his said contract; and he further avers, that the said C. C., on or about the 20th day of March, 1875, having failed to perform and complete the said contract on his part, abandoned the work on the said building, and left the same in an incomplete and unfinished state, and this defendant was compelled to complete and finish the said work at his own expense, and to employ men, and furnish and purchase materials for that purpose.

That the said building was completed and finished by this defendant in the month of July, 1875, and after the commencement of the proceedings to foreclose the said alleged lien of the plaintiff. And this defendant further alleges, that at the time the said C. C. so abandoned the work aforesaid, all sums which by the terms of the said contract were then due to him thereon, had been paid to him by this defendant.

Set-off and Counter-Claim.

And this defendant further answering, alleges that the said C. C., on or about the 20th day of March, 1875, abandoned work in and upon the building mentioned and referred to in the contract between him and the defendant in the said complaint mentioned, leaving the said building in an incomplete and unfinished state, and having failed to perform the covenants and conditions of said contract on his part covenanted and

FORM NO. 10.—ANSWER BY OWNER.

agreed to be performed, and that said C. C. having so abandoned the said work, and neglected to perform his contract, this defendant was obliged to, and did employ workmen to finish and complete the said building, and also to furnish the materials necessary to complete the said building, by means whereof this defendant was put to great expense, to wit, to about the sum of five thousand dollars, which said sum, with interest from the 31st day of July, 1875, this defendant claims to have allowed to him by way of a set-off, or counter-claim to any claim of the said C. C. under the said contract, in case the Court shall eventually determine that the said C. C. is entitled to any sum whatever under the said contract; and he claims and insists, in case the said Court should so determine, that the same may be allowed to him in any decree which the Court may make, adjusting the rights and interest of the parties herein.

Wherefore, the defendant B. B. demands judgment, that the alleged lien set forth in the plaintiff's claim be discharged of record, and that the complaint herein as to this defendant be dismissed with costs.

JOHN SHARP,
Att'y for Deft. B. B.

[Add the regular verification.]

FORM NO. 11.—ANSWER BY A LIENOR.

§ 214. **Answer and Claim by Lienor.**—Each lien-claimant, who is made a party defendant, may assert in his answer his own claim and be thereupon entitled to all the privileges of a plaintiff in respect to such lien.

FORM No. 11.

ANSWER BY A LIENOR.

COURT OF COMMON PLEAS.

A. A., *Plaintiff*,
against
B. B., C. C. & D. D., *Defendants*.

The defendant D. D., for a separate answer and claim, herein admits all the allegations on the part of the plaintiff in said complaint contained, except [or state allegations denied, if any].

FIRST. This defendant further alleges that on the 10th day of September, 1875, he furnished to the defendant C. C., at his special instance and request, and also at the instance of the defendant B. B., and in pursuance of the contract set forth in the sixth paragraph of said complaint, goods, wares, and merchandise, at stated prices, amounting to five hundred dollars, and

of that reasonable worth and value. That the said materials were furnished for and used in and upon the buildings mentioned in said complaint, and that the said C. C., thereupon undertook and promised to pay the said sum therefor, but that he has not paid the same nor any part thereof, and that there is due and owing to this defendant from the said C. C., the sum of five hundred dollars with interest from the said 10th day of September, 1875.

SECOND. This defendant further answering admits that the fourth, fifth, sixth, and eighth paragraphs in the complaint herein are true, and hereby incorporates the said paragraphs herein as a part of this defendant's separate claim.

[Conclude with the statement of lien as in paragraph 8, Form No. 4, and the prayer for relief as in the original complaint.]

Special defenses against any of the prior liens, may be added after the statement of the defendant's claim. This form applies to Form No. 4, *ante*.

TRIAL AND EVIDENCE.

CHAPTER XIV.

§ 215. **Mode of Proof—Indebtedness to Claimant.**—The mode of proof is the same upon the foreclosure of liens as in other actions. We have already stated in full the requisites necessary to secure a valid lien. All that is required on the trial is to show the existence thereof by the introduction of proof under the ordinary rules of evidence. The amount due the claimant on account of work done or materials furnished to the premises covered by the lien is the first step in the order of proof. This is the foundation of the statutory charge, and must be well proven, or the lien will be security for nothing, and fall. It consists in simply establishing a right of action in assumpsit for work done, or goods sold and delivered, on the credit of the building. The contract and the performance are the integral facts. It is only necessary on this point to state in addition to what is contained in Chapter III. that the tendency of our courts is to favor an equitable rule of granting a recovery *pro tanto*. in the case of a substantial performance, where no wilful breach has been shown; thus allowing no mere technical objection to prevent the mechanic from securing the fruits of his labor.

§ 216. **Quantum meruit—Proof of Values.**—*Quantum meruit* usually arises in two cases. First, where there has been a breach of contract on the part of the person contracting for the performance, and second,

where no specific price has been agreed upon for the work done or materials furnished. In the former case the contract price furnishes the measure of damages so far as applicable.* This is not an invariable rule. It has been held in such cases that the actual value may be recovered.† But it is a well settled rule of law that where a special contract for work and labor is terminated by the employer after the work is partly performed, the contractor is not confined to the contract price for such part performance, but may sue for the breach of performance; and, under proper counts, may recover in addition thereto his prospective profits.‡ Whether the lien may be enforced in such a case for more than the actual value of the work and materials as specified in the contract, is at least a question of doubt. It is certain that the *breach of contract* gives no right of lien, as it is the performance of work, not the justifiable failure to perform, that adds to the value of the property and forms a basis for statutory charge thereon,§ neither do presumptive profits add to the material benefit of real estate; and it would seem to follow that it is not chargeable therewith. On the other hand it may be urged that if the owner had permitted a full performance, a lien could have been enforced for the full sum

* Fells *v.* Vestvali, 2 Keys, 152.

† Doughty *v.* O'Donnell, 4 Daly, 60.

‡ See Clark *v.* New York, 4 N. Y., 338; (reversing S. C. 3 Barb., 288); and Jones *v.* Judd, 4 N. Y., 412.

§ Miner *v.* Hoyt, 4 Hill, 193—aff. 7 Id., 525. If public policy requires that the remedy should be extended so as to embrace the case of money agreed to be advanced otherwise than as a payment for work done upon the property in question, or for damages in a breach of the contract by the owner, the statute must contain such a provision. Loonie *v.* Hogan, 2 E. D. Smith, 681.

agreed upon, although a portion thereof represented profits, and not labor and material. Should the owner be allowed to defeat this by preventing a completion and cut the lien down to the actual values? If a profit is allowable as being merged into the contract price in the one case, why not in the other? Perhaps the best answer to this is that profits are only recoverable in an action founded upon the *breach* of the contract, and are not recoverable in an action for work done *under* the contract:* and the latter class of actions is the only one allowed in lien cases. The rule of damages in the former case is the loss or injury sustained by the party ready and willing to carry out the contract, and the work performed is simply an element in estimating the amount of the loss;† the amount of profits for the work unperformed so lost, being governed by the price of labor and materials at the time of the breach;‡ while the latter action is confined to the full value of the services or materials rendered.

§ 217. **Same Method of proving Values.**—The true *value* of the services rendered and materials furnished must be proven by the claimant; not what it cost him by days' work and payments to material-men, with a percentage over for his superintendence. It is *quantum meruit* as to the work and *quantum valebant* as to the materials. The claimant may have been improvident in his sub-contracts, or have fraudulently over-sta-

* See Clark *v.* New York, 4 N. Y., 338.

† See Shannon *v.* Comstock, 21 Wend., 457; Wilson *v.* Martin, 1 Den., 602; Spencer *v.* Halstead, Id., 606; Clark *v.* Marsiglia, 1 Den., 317.

‡ Masterton *v.* Brooklyn, 7 Hill, 61; and see Story *v.* N. Y. & H. R. R. Co., 6 N. Y., 85.

ted his payments, and thus the apparent cost to him would neither represent the enhanced value of the buildings nor the real value of the work done. The true mode of computation is by experts, mechanics or builders, who measure the work, examine the materials, and compute the cost of reproducing the same at the time of performance.* Where the work consists in the erection of an entire building, the same rule of computation applies. In such a case it would be obviously unsafe to estimate the value of the structure *as* a building, or the increased value of the lot by virtue of its construction, which depends upon elements other than the abstract value of the work and materials thereon.†

When the position of the claimant can be assimilated to that of a special agent or superintendent of the owner, the rule is of course different. He would be entitled to a charge for his own services and his disbursements, including the amount *paid* for labor and materials. Growing out of this relation a custom prevails especially in the case of repairs, for the plumber, carpenter, etc., who receives instructions for the performance of work, to charge the regular market price of the materials, and so much per day for the workmen employed by him; making no special charge for his own services but securing a commission or rebate on the purchase of the materials and a profit on the labor—usually fifty cents a day. When this custom comes to the knowledge of the contracting party, or prevails to such an extent as to become a general custom, there is no doubt of its enforcabil-

* Hauptman *v.* Catlin, 1 E. D. S., 729; Gilman *v.* Gard, 29 Ind., 291; Haviland v. Pratt, 1 Phila., 322; Kugler *v.* Wiseman, 20 Ohio, 361.

† See Associates of Jersey *v.* Davidson, 5 Dutcher (N. J.), 415.

ity in the courts. And in all cases the cost price—whether it is labor or material—may be shown, as evidence bearing upon the value or market price, the same as in replevin, where the price paid for the articles in question may be received as evidence *pro tanto* on the question of values.

§ 218. **Proof of Owner's Liability to Sub-Contractors—Statute of Frauds.**—Privity of estate is sufficient under the statute to charge the property ; but privity of contract is necessary to charge the owner personally.* This position is so manifest and fair, that in nearly every instance where the owner is sought to be held personally liable by a claimant other than the original contractor, it has been by virtue of a direct promise from him or his agent to pay for the work or materials in question. Whether or not such a promise is binding in law, depends upon the statute of frauds, which applies here as well as in other cases of a promise to answer for the debt, default, or miscarriage of a third person. Thus a parol promise of the vendor under a building-loan contract, to pay for goods previously furnished to the vendee ; or his parol promise to accept a bill drawn on him therefor, is within the statute and void.† Although the agreement of sale is also void under the statute, any subsequent parol promise to accept an order to be drawn on the owner by the contractor as well as a parol acceptance thereof, has been held to be void, except for the purpose of raising a presumption of an existing indebtedness from the former to the latter, on the building contract, rebuttable by direct proof to the

* Greenway *v.* Turner, 4 Md., 296.

† Loonie *v.* Hogan, 9 N. Y., 435.

contrary.* So far however as this principle refers to a parol acceptance, it must be qualified by the well-settled rule that an order given on any specific fund, is, *pro tanto*, an equitable assignment thereof, binding on the drawee or holder of the fund, by mere notification. An unqualified acceptance and promise to pay, though in parol would be binding to the extent of a subsisting or subsequent liability to the drawer on account of such fund.† It has also been held in this State‡ that a parol promise by the owner, made to a sub-contractor when only a small portion of the work was performed, to hold enough money in his hands to pay the latter in full if he would complete his contract, is void under the statute. In that case the owner entered into a written agreement with the contractors, by which the latter agreed to erect a building for the former on his premises, the contractor to furnish the materials therefor. The agreement provided that the owner could retain money from the contractors and pay it to the material-men who furnished them with material for the buildings. The lienors made an agreement with the contractors to furnish them with necessary brick for the buildings. Becoming distrustful of their responsibility, the lienors applied to the owner to retain sufficient money to pay for the brick, and to pay them

* Pike *v.* Irwin, 1 Sandf., 14.

† Young Stone Dressing Co. *v.* Wardens, etc. of St. James' Church, 61 Barb., 489; and see to the effect that such an order without an acceptance transfers the fund to the drawee, Lowery *v.* Stenard, 25 N. Y., 239; Schuttleworth *v.* Bruce, 7 Rob., 160; Hall *v.* Buffalo, 1 Keyes, 193; Ireland *v.* Smith, 1 Barb., 419; Lewis *v.* Berry, 64 Id., 593.

‡ Meyer *v.* Beach, 14 Hun, 231.

for it, which the latter promised to do if they would keep him advised from time to time of the amount remaining. In addition to this direct promise the owner said he would "see them through," etc. Payments not being made, liens were filed, the claim being made direct against the owner. Judgment was recovered before the referee, against the owner personally, but the lien was dismissed. At General Term the promise of the owner was held to be collateral to the original contract, under which the work was in fact performed, and therefore void under the statute of frauds. The court, citing Brown *v.* Weber (38 N. Y., 187); Cowdin *v.* Gottgetreu (55 N. Y., 650); Duffy *v.* Wansch (42 N. Y., 243), to show that to recover in such a case it must be shown that the person to be charged must be the *exclusive* debtor and primarily liable for the debt.* There is no doubt however as to the proposition that a promise by the owner to pay for material to be delivered to the contractor is valid and binding, provided it was made under such circumstances that the credit of the future deliveries was entirely given to the owner under such promise. This would create an original undertaking not within the statute.† So the promise to pay

* To the same effect in substance see Devlin *v.* Woodgate, 34 Barb., 252; Payne *v.* Baldwin, 14 Id., 570; Brown *v.* Weber, 38 N. Y., 187. The converse of this rule seemed formerly to prevail. Thus where the owner failed and a third person who had purchased his interest induced the contractor to complete the buildings under the original contract by holding out a promise to pay for the same, the old Supreme Court held this promise an original undertaking, and not within the statute. And the same principle is followed in Lippincott *v.* Aschfeld, 4 Sandf., 611; Quintard *v.* De Wolfe, 34 Barb., 97; and Chesterman *v.* McCostlin, 6 N. Y., Leg. Obs., 212.

† Chase *v.* Day, 17 John., 114; Flanders *v.* Crolius, 1 Duer., 206.

the debt of another which is a lien upon the property transferred to the promissor, is not within the statute when made a part of the *res gestæ* by showing that it was made at the time of taking the indicia of title to the property in question.* It has also been held that an oral promise to pay the amount of a mechanic's lien upon the property of the person making it is not within the statute, though made after the furnishing of the materials, on the ground that it is a promise to pay the debt of the owner's own building, the payment of which could be legally enforced against it, and though not *his* debt, his property being answerable for it, a direct and absolute engagement to pay was in *relief of his property*, and hence, in a certain liberal sense, not "a promise to answer for the default or miscarriage of another." † While it may be true that a promise to pay any claim that the promisor is in equity obliged to liquidate, as for instance the benefit derived from the unsolicited services of another, creating a moral obligation for the payment thereof, though not sufficient to raise the presumption of an implied contract to pay, will sustain a subsequent verbal assumption thereof, the past consideration being sufficient to evade the terms of the statute of frauds, yet our courts will hardly go so far as to hold that the filing of a lien upon the promises of another creates any such a moving consideration in favor of

Dixon *v.* Frazee, 1 E. D. Smith, 32; Darlington *v.* McCann, 2 Id., 411; Griffin *v.* Keith, 1 Hilton, 58; Hanford *v.* Higgins, 1 Bos., 441; McCaffil *v.* Radcliff, 3 Rob., 445; McDaniel *v.* Weaver, 14 Ind., 517; Holmes *v.* Shands, 4 Cush. (Miss.), 639.

* Winfield *v.* Potter, 10 Bos., 226; S. C., 24 How., 446.

† Landis *v.* Royer, 59 Penn., 95.

the promissor and against the owner, as would support an undertaking otherwise void under the statute. The rule adopted in Texas, though not coming so strictly within the common law requirements, certainly favors equity and justice. Thus in Pool *v.* Sanford (52 Texas, 621), their courts say: "If the testimony should show that the sub-contractors were about to abandon the work because they were apprehensive the original contractor would not pay them, or for other good and sufficient reason, and that to prevent this were induced by the owner, under verbal representations, to continue and complete their part of the work in consideration that he would pay them therefor, this consideration would be sufficient to take the case out of the statute of frauds, and the sub-contractors would be entitled to a personal judgment against the owner thereon, or a judgment enforcing their lien, filed as original contractors."

§ 219. **Payment.—Burden of Proof.**—The presumption of the law is that payment is to be made as soon as the materials are delivered or the work performed.* Hence where the sub-contractor has proved his own account and a substantial performance of the original contract under which he claims, he is not obliged to go further and show what payments have been made on either contract; the onus is on the person claiming such payments as an affirmative defense to make proof thereof. And whenever performance is shown and the days of payment past, the law assumes the continued liability to make such payments.† So where it is shown that the original contract is entire and calls for a single lump sum to be paid therefor, but speci-

* Claycomb *v.* Cecil, 27 Ill., 497; Brady *v.* Anderson, 24 Id., 110.

† Rudd *v.* Davis, 1 Hill, 277.

fies that payments shall be made on account as the work progressed, the law will assume, after a considerable portion of the work has been performed, that there is money due the contractor under the contract.

§ 220. Same—Must be due at time of Foreclosure.—Neither the owner* nor the contractor, nor any other person standing between the claimant and the owner, can be forced by virtue of the lien laws to pay money before he has contracted to pay it. Any statute assuming such an enforcement would be in violation of express contract and unconstitutional. The claimant must therefore show that money was due from the owner and under each intermediate contract at the time of filing the notice, or subsequently and before the commencement of the action.† The condition of affairs at the time of the commencement of the suit in foreclosure, is the true subject of inquiry, if money was then due from the owner; or if payments had been made subsequent to the filing of the notice the right of action is complete.‡ But the defense is just as perfect where the claim against the owner or contractor, had not matured at the time of the service of the summons in foreclosure, as it would be in an action of assumpsit.§ It is no answer to this proposition to assert that where the owner, in the

* Pendleburg *v.* Meade, 1 E. D. S., 728; Cronk *v.* Whittaker, Id., 647.

† Schneider *v.* Hobein, 41 How., 232; Hauptman *v.* Halsey, 1 E. D. S., 668; Sullivan *v.* Brewster, Id., 681; S. C., 8 How., 207; Spaulding *v.* King, 1 E. D. S., 717; Haswell *v.* Goodchild, 12 Wend., 373.

‡ See Doughty *v.* Devlin, 1 E. D. S., 625; Pendleberg *v.* Meade, Id., 647.

§ See Preusser *v.* Florence, 4 Abb., N. C., 136.

building contract, causes the payment to fall due after the time to enforce the action has expired, he waives this defense; for the proceeding is statutory and must be followed to the letter. The contract must conform to the statute, not the statute to the contract.*

§ 221. Variance as to Specific Dates.—It has been held in Pennsylvania that a variance between the proof and the bill of particulars in regard to the specific days when materials were furnished, is not fatal, provided it sufficiently appears that all the materials were delivered within the statutory period allowed for filing the notice of claim.† This was upon the theory that such a strict requirement could not always be met by common-law proof, and reliance would have to be placed upon the accuracy and competency of the claimant's book of original entries. But it is doubtful if this rule now prevails in that State,‡ and it is certain that the alleged reason for it does not exist at present, as original entries, made by a witness, may always be used as a memorandum to refresh his memory, and in many cases they can be treated as original evidence. This whole question is, however, governed by the general rules applicable under the Code, to a bill of particulars.

§ 222. Variance from Contract specified in the Lien.—Following this same general rule it has been held that a variance between the proof and the contract as specified in the notice of claim is fatal.§ This rule

* Pribble *v.* Hall, 13 Bush. (Ky.), 61.

† Haviland *v.* Pratt, 1 Phila., 364.

‡ Milligan *v.* Hill, 38 Penn., 237.

§ So held in the case of a joint lien on several houses, in Gorgas *v.* Douglas, 6 S. & R., 512; and where the proof shows a different price, Stein *v.* Schultz, 23 Ill., 646; or time of payment, Roach *v.* Chapin, 27 Id., 196; Van Court *v.* Bushnell, 21 Id., 624.

is much more justifiable than that founded upon a variance between the pleadings and proof, as the pleadings may be amended, while the lien cannot. Moreover a strict compliance with the statute means a *correct* statement of the claims in the notice of lien, which is shown to be wanting where a substantial variance appears on the trial. In this connection, however, it will be well to note the effect of the rule in Gambling *v.* Haight,* in which the Court of Appeals permitted the claim under the contract as specified in the lien, as well as in the complaint, to be abandoned, and *quantum meruit*, for the work and materials to be substituted therefor.

§ 223. Claims not stated in the Complaint.—Although Gambling *v.* Haight is authority for increasing the amount of the personal claim in a proper case by declaring upon the full value of the work and materials in place of the contract price for the same, the rule still prevails that no other work or materials can be proved on the trial than that designated in the original claim, and the right of recovery *upon the lien* is limited in amount to that stated in the notice, with interest and costs.†

§ 224. Proof of Statutory Requirements.—Having established the amount due the claimant, the next thing to be done is to bring the claim within the provisions of the statute, so as to constitute it a charge upon the land. Where the materials are furnished to the sub-contractor, an indebtedness to the contractor, and from him to the sub-contractor, must be shown.† There must be no break in the chain of liabilities, as

* 14 Abb., N. S., 398.

† Protective Union *v.* Nixon, 1 E. D. S., 671; Sullivan *v.* Decker, Id., 699; Lutz *v.* Ey, 3 Id., 621.

neither the owner nor any person standing between him and the claimant can be made, by virtue of a special statute, to pay more than he is liable to, by contract.* It is also necessary to show the *time* of performance in order to bring the claim within the statutory period. We have heretofore (see Chap. XI.) discussed the principles applicable to this branch of the inquiry. Nothing need be added except to urge great care in, and a strict compliance with, the provisions of the statute.

§ 225. The Persons or Property Credited with Sales—Book Entries—Admissions, etc.—It is necessary to prove that materials were sold *for* as well as *used* in the particular building charged by the lien. A general sale does not give the right of lien upon any building in which the purchaser may chance to place it.† Books of original entry may be introduced as evidence on this point, although they do not meet all the requisites necessary to establish them as complete evidence of the fact of the sale itself.‡ It is necessary however, to prove that the books used for this purpose contain the original entries of each day's transactions in the usual course of business;§ this being proven, they may be used to show either that the material was charged directly to the building, or that the credit was given to the particular person sought to be affected by the lien.‖ Entries of this character,

* To prove liability, see §§ 55 to 68 as to *performance*, and Chaps. VI. and VII. as to payment and set-off.

† Watrous *v.* Elmendorf, 55 How., 461.

‡ McMullen *v.* Gilbert, 2 Wheat., 277.

§ Singerly *v.* Doerr, 62 Penn., 9.

‖ Kelly *v.* Brown, 20 Penn., 446; McMullen *v.* Gilbert, 2 Wheat., 277; Church *v.* Davis, 6 Watts, 304; Barber *v.* Smith, 38 Penn., 296.

though part of the *res gestæ* are really hearsay, and their admission is an exception to the Common Law rules of evidence, and neither for nor against the person making them do they amount to more than a reputable presumption of the facts therein specified.*

The relation between the contractor and owner not being that of agency, the declarations of the former as to the satisfactory completion of the work,† or as to the application of the claimant's materials to the building,‡ not made in the presence of the latter, cannot bind him in an action upon a sub-contractor's lien. But the statutory provision that the *building* shall be liable for materials furnished to the contractor, his receipts therefor made at the time of delivery are part of the *res gestæ* and may be offered in evidence to prove the fact of delivery ;§ and whenever the agency is such that the acts of the agent shall bind his principal, then his admissions made at the time of the transaction to which they refer, are evidence as part of the *res gestæ* :‖ but this principle will not be so extended as to make the architect's declarations in purchasing materials, evidence against the owner, without further proof of authority than that growing out of his position as architect ; and it is error in the absence of express proof of agency, for the court to instruct the jury that if they should

* Kelly *v.* Brown, 20 Penn., 446; Hauptman *v.* Catlin, 1 E. D. S., 729.

† Trensch *v.* Shryock, 51 Md., 162.

‡ Schulinberg *v.* Hawley, 6 Mo., App., 34; *sed contra*, where the admissions were made at the time of the purchase, Dickinson College *v.* Church.

§ Trensch *v.* Shryock, 51 Md., 162.

‖ McDonnell *v.* Dodge, 10 Wis., 106.

find that he was the agent of the owner, then his admissions and declarations would be binding.* The declarations of the owner to the claimant, a sub-contractor, that he had retained sufficient money to discharge all liens, are evidence in favor of the latter, and for work done thereafter will act by way of estoppel.† Of course the rule applies in mechanics' liens as elsewhere, that declarations made by the assignor after the assignment are inadmissible ;‡ but admissions of the owner made before the execution of the deed are usually binding on the grantee, and the building contract can be proven in this manner.§

§ 226. The Same—Filing and Continuance of the Lien.—Next in order is the proof of the filing of a proper notice of claim. The necessity of this is often obviated by the pleadings. Where the complaint alleges that in order to perfect a lien filed on a specified day, with the county clerk of proper county (naming it), a notice of claim (a copy of which is hereunto attached marked "A" and forms a part of the complaint), it is difficult for the owner to put the allegation in issue since he is supposed to know of the existence and the exact character of the claims upon his own property. If it is admitted in the answer, then this element stands confessed. If not, the proper proof must be submitted on the trial. This may be done either by requiring the clerk under a *subpœna duces tecum* to produce the original, or, what is preferable, by submitting a copy thereof certified to by the clerk under

* McDonnell *v.* Dodge, 10 Wis., 106.

† Lewis *v.* Morgan, 11 S. & R., 234.

‡ Howard *v.* Veasie, 3 Gran., 233; Carson *v.* White, 6 Gil., 17.

§ Edwards *v.* Derrickson, 4 Dutch. (N. J.), 39.

his official seal. The General Term of the Supreme Court (4th Dept.),* have held that if the instrument does not prove itself (*i.e.* unless it is acknowledged before a notary, or other competent officer), the certified copy is inadmissible for want of identification. This rule was followed, though plausibly objected to, by Judge Spencer, of the Steuben County Court, in the case of Jennings *v.* Newman, 52 How., 282, and under the principle of *stare decices*, if for no other reason, is law, applicable equally well where the original is produced. Whether it will apply where the claim is verified as required under the Cities' Act of 1880, may also be doubted, since, in a certain strict sense an affidavit is not an acknowledgment, and the officer taking it does not affirmatively state that he knows the affiant; moreover the verification need not be made by the claimant or any one connected with him. It is better, therefore, to properly identify the notice offered in evidence either by the claimant or some one privy to the filing, and also to prove that it was properly entered on the docket of liens as required by the statute. Where, as under the New York City Act of 1875, it is necessary that the action should be commenced within a specified time, that fact must be affirmatively shown. It is not safe to leave it to conjecture by the dates of the several pleadings or proceedings connected with the action. It is also necessary, where a continuance each year is required by statute to prove that this has been done. These are all affirmative requirements, not negative defenses.

§ 227. **Trial of the Issues.**—Where all of the defendants have answered, the case may be put upon the

* Sampson *v.* Buffalo, N. Y. & Phila. R. R. Co., 2 Hun, 512.

calendar and tried by the Court and jury, or by a Referee, duly appointed by the Court, the same as in ordinary actions. The same rule is followed where only part of the defendants have answered, except that notice must be given, where the trial is by the Court without a jury, to the defendants who have appeared but not answered, that the plaintiff will, at the same time, apply for the relief demanded therein. The Court may then try the existing issues, and, also, take the plaintiff's proofs of the facts necessary for the rendition of a judgment against those who have not answered, and order a final judgment without first ordering a reference, as to such defendants. The forms and proceedings in such a case are the same as in an ordinary mortgage foreclosure.

§ 228. **The Order of Reference.**—Practically, the trial, in the foreclosure of a mechanics' lien, where there is an actual contest, is by a reference obtained either by consent of the parties or by an order of the Court on motion.

FORM No. 12.

STIPULATION AND ORDER OF REFERENCE.

(TITLE OF THE CAUSE.)

It is hereby stipulated and agreed between the parties to this action, that all of the issues herein, whether of law or of fact, be referred to John Brown, Esq., Counselor-at-law, of the City of New York, to hear, try, and determine the same, and that an order of the Court be entered to that effect.

JOHN THOMPSON, *Att'y for the Plaintiff.*
JAMES WHITE, *Att'y for the Deft. B. B.*
JOHN SMITH, *Att'y for the Deft. C. C.*

FORM NO. 12*a*.—ORDER OF REFERENCE ON MOTION.

ORDER.

(TITLE OF THE CAUSE.)

Upon reading and filing the annexed consent, it is hereby ordered that this action and all the issues therein, whether of law or fact, be, and the same is hereby referred to John Brown, Esq., Counselor-at-law, of the City of New York; as sole Referee, to hear and determine the same, and the said Referee is also directed to ascertain and determine the rank of each lien, or class of liens asserted against the premises described in the plaintiff's complaint, and report thereon to this Court with all convenient speed.

JOSEPH JOHNSON,
Clerk.

Dated August 14th, 1875.

§ 229. **Order of Reference on Motion to the Court.**—Where the parties will not consent to a reference, the plaintiff must secure a reference by a motion to the Court. The affidavit and notice of motion is the same as in the ordinary practice under the Code. The order of the Court may be drawn as follows:

FORM No. 12*a*.

ORDER OF REFERENCE ON MOTION.

(TITLE OF THE CAUSE.)

Upon reading and filing the affidavit of A. A., dated July 18th, 1875, and notice of this motion there-

to annexed, with proof of due service thereof, and upon the pleadings and proceeding in this action, after hearing Andrew Hammersley, Esq., for the motion, and John Sharp, Esq., in opposition thereto, on motion of Andrew Hammersley, Esq., attorney, for the plaintiff, it is ordered that the issues in this action be, and the same are hereby referred to John Brown, Esq., Counselor-at-law, of the City of New York, as sole Referee, to hear and determine the same. And the said Referee is also directed to ascertain and determine the rank of each lien, or class of liens, asserted against the premises described in the complaint herein, and report thereon to this Court with all convenient speed.

JOSEPH JOHNSON,
Clerk.

Dated August 14th, 1875.

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§ 230.—FORM No. 13.

REPORT OF REFEREE.

COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

A. A., *Plaintiff*,
against
B. B., C. C., D. D., E. E., & F. F., *Defendants.*

To the Court of Common Pleas:

In pursuance of an order made in the above enti-

tled action bearing date, the 10th day of September, 1875, by which the above action and all the issues therein were referred to me as sole Referee to hear and determine, I do respectfully report that I have been attended from time to time by the counsel of the respective parties in this action, and have heard the allegations of the said parties, and from such proofs, and from the pleadings in this action I do find the following facts:

Findings of Fact.

First. That at the city of New York, between the 10th day of May, 1875, and the 20th day of June, 1875, the plaintiff and the defendants, D. D. and E. E., at the instance of the defendant and owner, B. B., and under and in pursuance of a contract then existing between the said defendant, and the defendant and contractor, C. C., and at the special instance and request of the said contractor, C. C., performed work, labor, and services, and furnished materials for the erection and construction of a certain building erected upon the premises described in the complaint herein, and that the work, labor, and materials, so performed and furnished by the plaintiff, were of the value of fourteen hundred and fifty dollars, and that he has only received the sum of five hundred dollars on account thereof, and that there was due, and owing to the said plaintiff, at the time of the filing of the claim by him hereinafter mentioned, the sum of nine hundred and fifty dollars on account of said work and materials; and that the work, labor, and materials, so performed and furnished by the defendant D. D., were

of the value of four hundred and ninety dollars, and that no part thereof has been paid. And that the work, labor, and materials, so performed and furnished by the defendant E. E., was of the value of two hundred and forty dollars, and that no part thereof has been paid. And that there was due, and owing from the defendant B. B. to the defendant C. C., upon, and on account of the said original contract between said defendants, at the time of the filing of each of the several liens hereinafter specified, the sum of twenty-five hundred dollars, and more than sufficient to pay all of said claims.

Second. That the said A. A., D. D., and E. E. were claimants and sub-contractors under the said original contract between the defendants C. C. and B. B., and that no other liens or encumbrances have been established against said premises, and that the claimants herein, filed with their several pleas in this action, a *lis pendens* against said premises, which was duly noted on the lien in said County Clerk's Office, and that all of said pleas were filed within ninety days from the filing of the first of said notices of claim.

Third. That on the 2d day of July, 1875, the defendant E. E., filed with the Clerk of the City and County of New York, in due form of law, a notice of claim against the premises described in the complaint herein, for the amount due him as aforesaid from the defendant C. C. That the plaintiff on the 4th day of July, 1875, filed with the Clerk of the City and County of New York, in due form of law, a notice of claim against the premises described in the complaint herein, for the full amount due him as aforesaid from

the defendant C. C. And that the defendant D. D. on the 12th day of July, 1875, filed with the Clerk of the City and County of New York, in due form of law, a notice of claim against the premises described in the complaint herein for the full amount due him as aforesaid from the defendant C. C. And that at the time of filing of the several notices of claim, the said B. B. owned said premises in fee, and was indebted to said C. C. in the sum of $2,500.

Findings of Law.

And from the foregoing facts and the pleadings in this action, I find and decide as conclusions of law:

First. That the defendant C. C. is indebted to the plaintiff herein, at the date of my said report in the sum of one thousand dollars, and that the plaintiff has a valid lien for said sum, and the interest thereon from the date of this report, upon all the interest which the said B. B. had in said premises, on the 4th day of July, 1875. That the said defendant C. C. is indebted to the defendant D. D., at the date of my said report, in the sum of five hundred dollars, and that the said D. D. has a valid lien for the said sum, and the interest thereon from the date of this report upon all the interest which the said B. B. held in said premises on the 12th day of July, 1875; and that the said defendant C. C., is indebted to the defendant E. E., at the date of my said report, in the sum of two hundred and fifty dollars, and that the said E. E. has a valid lien for the said sum, and the interest thereon from the date of this report upon all the interest held by said B. B. in said premises on the 2d day of July, 1875.

Second. That the liens of the several claimants mentioned are of the same class, and that they rank in priority and in the order of payment, as follows FIRST, the lien of the said E. E. SECOND, the lien of the said A. A. THIRD the lien of the said D. D.

Third. That the claimants A. A., D. D., and E. E., are entitled to a decree directing the sale of the premises mentioned in the complaint herein to the extent of the right, title, and interest of the defendant B. B. therein on the 2d day of July, 1875, or to the sale of so much thereof as may be sufficient out of the moneys applicable thereto to pay each of said claimants the amount herein awarded to be due to them respectively together with the interest and costs upon each of said claims at the date of such sale.

Fourth. That out of the moneys arising from such sale after deducting the fees and expenses thereof, and all liens existing thereon for unpaid taxes and assessments, and the costs hereinafter to be awarded by the court to each of said claimants, that the balance of said moneys be applied towards the payment of the said claim in the order of payment hereinbefore designated, and that the surplus moneys remaining over, after the payment of said claims in full, be paid into Court to abide the further order of the Court.

Fifth. If the proceeds of such sale be insufficient out of the moneys applicable thereto, to the said claims of each of said claimants in full, with the interest and costs aforesaid, that the defendant C. C. be decreed to pay to each of said claimants the amount so remaining due as aforesaid, and that the claimant in whose favor such deficiency exists, be authorized to

docket judgment against the defendant C. C., for the amount so remaining due and unpaid.

Sixth. That the defendants and all persons claiming under them, or any or either of them, after the filing of the several notices of pendency of this action, by the claimants herein, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the premises so sold, or any part thereof, and I order judgment accordingly.

Dated September 21, 1875.

JOHN THOMPSON,
Referee.

Fees $——.

FORM No. 14.

Judgment of Foreclosure and Sale.

At a Special Term of the Court of Common Pleas, held at Chambers thereof, in the New County Court-House, in the City and County of New York, on the 10*th day of October*, 1875.

Present Hon. Joseph P. Daly, *Chief Justice.*

[Title of the cause—the same as in complaint.]

The above-named plaintiff and the defendants D. D. and E. E., having each acquired a mechanics' lien against the defendant B. B., as owner of the premises hereinafter described, in pursuance with the terms of the statute in such case made and provided, by virtue

of the performance of certain labor upon and the furnishing of certain materials to be used in the construction, alteration, and repair of a building erected upon the said premises; which said liens have heretofore and within the time allowed by law for that purpose, been duly perfected by the filing of a claim by each of them respectively, according to the statute applicable thereto; and that on the 10th day of August, 1875, the plaintiff commenced an action in this court for the foreclosure of the said lien, filed by him as aforesaid by the service of a summons and complaint upon the defendants B. B. and C. C., and of a like summons with a notice of the object of action upon the defendants D. D., E. E., and F. F., against whom no personal claim was made by said plaintiff; and that the said plaintiff did, on the 10th day of August, 1875, duly file with the Clerk of the City and County of New York, a notice of the pendency of such action, and an entry thereof on that day having been made in the lien docket of said county, and that the defendants E. E. and D. D. having each filed a like notice within the time prescribed by the statute, and also at the same time having filed separate answers setting forth their several claims, and issues having been joined between the respective parties hereto, and the same having, by order dated September 10, 1875, been referred to JOHN THOMPSON, Esq., as sole referee, to hear, try, and determine the said issues and rights of the respective parties herein, and he having duly made his report, bearing date the 21st day of September, 1875, which has been duly filed, by which it appears that the defendant B. B. as owner, was indebted to the defendant

FORM NO. 14.—JUDGMENT OF FORECLOSURE AND SALE.

C. C. as contractor, at the time of the filing of the several liens herein in the sum of *two hundred and fifty* dollars, and to the plaintiff A. A., in the sum of one thousand dollars, and to the defendant D. D., in the sum of five hundred dollars, and that all of said liens are of the same class, to wit, as sub-contractors, and that the lien of the said E. E., being filed on the 2d day of July, 1875, ranks first, and the lien of the said plaintiff, being filed on the 4th day of July, 1875, ranks second, and the lien of the said D. D., being filed on the 12th day of July, 1875, ranks third in the order of payment, and that at the time of the filing of the *lis pendens* herein, the said plaintiff and the defendants E. E. and D. D. were the only persons having perfected claims thereon under the Mechanics' Lien Act of May 17, 1875, and that the defendant and owner B. B., was, at the time of the filing of said claims and each of them, indebted to the defendant and contractor C. C., in the sum of two thousand five hundred dollars, and more than sufficient to pay all of said claims in full.

Now, on motion of *S. F. Kneeland*, attorney for the *plaintiff*, it is adjudged that the premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient, out of the moneys applicable thereto, to pay the amount due to the *plaintiff* and to the defendants, D. D. and E. E., for principal, interest, and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction in the *City and* County of *New York*, by, or under the direction of, *John Doe, a Referee hereby duly appointed for that*

purpose. That the said *Referee shall* give public notice of the time and place of such sale, according to law and the practice of this Court; that either or any of the parties to this action may purchase at such sale; that the said *Referee shall* execute to the purchaser or purchasers, a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, the said Referee shall first pay to the plaintiff, or, to *S. F. Kneeland*, his attorney, the sum of *two hundred* dollars, adjudged to the plaintiff for his costs and charges in this action, with the interest thereon, from the date hereof. And that out of the overplus he shall pay, 1st: To the defendant, D. D., the sum of *two hundred and fifty dollars*, so reported due, as aforesaid, together with the interest thereon, from the date of said report, and an additional sum of *twenty-five* dollars, adjudged to him for his costs and charges in this action, with interest, from the date hereof. Then, 2d: To pay the plaintiff the sum of *one thousand* dollars, so reported due, as aforesaid, with interest, from the date of said report. Then, 3d: To pay to the defendant, E. E., the sum of five hundred dollars, so reported due, as aforesaid, with the interest thereon from the date of said report, and, also, the additional sum of *fifty* dollars, adjudged to him for his costs and charges in this action, with interest thereon, from the date hereof; or, so much thereof, in the order hereinbefore designated, as the purchase money of the said premises will pay of the same, and take a receipt

therefor, and file it with his report of sale. That the surplus moneys arising from the said sale, if any there should remain, be *paid into this Court*, within five days after the same be received and ascertainable, subject to the further order of the Court; that he make a report of such sale and file it with the Clerk of this Court with all convenient speed. That, if the proceeds of such sale be insufficient to pay the amount so reported due the *plaintiff and the defendants, D. D. and E. E.*, with the interest and costs, as aforesaid, the said *Referee shall* specify in his report of sale the amount of such deficiency, and which claims, in the order named, is affected thereby, and that the defendant, C. C., shall pay the same; and that the plaintiff and the defendants, D. D. and E. E., or either of them, in whose favor such deficiency exists, have judgment and execution against the defendant, C. C., for the amount of deficiency due them, or either of them respectively, from the said defendant, C. C.

And, it is further adjudged, that the *defendants*, and all persons claiming under them, or any, or either of them, after the filing of such notice of pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption, in the premises so sold, or any part thereof. And that the purchaser, or purchasers, at such sale, be let into possession on the production of the said Referee's deed and a certified copy of the order confirming the report of sale.

The following is a description of the mortgaged premises hereinbefore mentioned: [Here insert a full

description by metes and bounds, the same as in the complaint.]

General Principles of Practice.

§ 231. **The Proceedings for Enforcement of the Decree, and upon Appeal,** are the same as under the foreclosure of a mortgage. A good general rule to be followed, in the practice under both the New York City and Kings County Acts, is to follow the ordinary forms in foreclosure suits, and conform to the rules of practice therein, except where the statutes lay down a different rule.

§ 232.—The practice in Kings County is very similar to that in New York City, and to the foreclosure of a real estate mortgage.

§ 233. **The notice of lien** is similar to that under the New York City Act of 1863. The main distinction between the present Kings County and New York City Acts, is that under the former no verification be required, and a copy must be served on the owner.

The following is the usual form under the Kings County Act:

FORM No. 15.

NOTICE OF CLAIM.

To the Clerk of the County of Kings; and all others whom it may concern:

Take notice, that under and in pursuance of an act of the Legislature of the State of New York, passed April 24th, 1862, entitled "An Act for the better se-

curity of Mechanics, Laborers, and others who perform, labor, or furnish materials for buildings and other improvements on land in the Counties of Kings and Queens," I claim a lien upon the building hereinafter described, and the appurtenances and lot of land upon which the same stands, for the value of one thousand dollars, for work and materials furnished by me, and used in the erection, altering, or repairing of said buildings; that the amounts of my claim for the value of said work and materials so used upon said buildings by me is the sum of one thousand dollars and interest; that the said work and materials were done and furnished within three months next preceding the filing of this notice; that the person against whom the claim is made is C. C., and that the owner of said building, appurtenances and lot of land is B. B., and that the said work and materials so furnished, was, by and at the request of the said C. C. (contractor), used in the erection, altering, or repairing of said building and appurtenances by the said C. C., with the knowledge, consent, and permission of B. B., the said owner. And that the said building is situated in the City of Brooklyn, County of Kings, and State of New York, on the following described lot of land. [Here insert description or diagram of the premises.]

A. A.,
Claimant

Dated at Brooklyn, this 15th day of February, 1875.

§ 234. **Commencement of Action—Notice by Owner**—The claimant has one year within which he may commence a proceeding for the foreclosure of his lien.

The action must be commenced, and a *lis pendens* filed within the year or the lien will be lost. The owner, however, has power to compel a claimant to commence his action within thirty days by the service upon him of a notice to that effect.

FORM No. 16.

OWNER'S NOTICE TO COMMENCE PROCEEDINGS.

To A. A., claimant.

SIR:—Take notice that you are hereby requested to commence an action for the enforcement of a mechanics' lien, filed by you the 20th day of April, 1875, in the Clerk's Office of the County of Kings; a copy of which notice is hereunto annexed, marked "Exhibit A." And also take notice that if you fail to commence such action within thirty days from the service of this notice upon you, the said lien will be discharged.

B. B.,
Owner.

Dated, May 10th, 1875.

§ 235. **Affidavit and Order of Discharge.**—After the expiration of thirty days from the service of the notice, the owner may procure the discharge of the lien, by an *ex parte* order of the Court, founded upon the affidavit of personal service of the notice on the claimant therein named and the following affidavit by the owner:

FORM No. 17.

AFFIDAVIT BY OWNER.

State of New York, County of Kings, ss.:

B. B., being duly sworn, says that he is the owner named in the annexed notice of lien, that on the 10th day of May, 1875, he caused to be personally served on the claimant A. A. the notice hereto annexed, marked Exhibit B., as appears from the affidavit of such service hereto annexed. That more than thirty days have expired since the service of said notice, and that no action or proceeding has been commenced by the said claimant for the foreclosure or enforcement of the lien annexed to said original notice, and that no affidavit of the issuing or service of a summons upon said lien has been filed in the Kings County Clerk's office, as appears by the certificate of said County Clerk hereunto attached. B. B., *Owner.*

Sworn, etc.

Indorsement.

On the within affidavits and exhibits, let the lien set forth therein be discharged of record.

JOSEPH DONOHUE, J. S. C.

§ 236. **In the Enforcement of the Lien** the New York City forms may be followed generally. The distinctions may be traced from the Complaint, Report of Referee, and Order of Judgment, hereinafter set forth. It seems to be settled by the lower courts that a personal judgment cannot be entered under this act, for the reason that it does not expressly authorize such a judgment. Although the Court of Appeals have not

passed upon this question, it is advisable to enter a personal judgment under a separate action founded upon the original demand. This simply refers to a personal judgment against the owner, when a lien is filed by the contractor. The rule has since been changed.

§ 237.—FORM No. 18.

COMPLAINT—CONTRACTOR AGAINST OWNER.

(Short Form.)

CITY COURT OF BROOKLYN.

A. A., *Plaintiff*,
against
B. B., *Defendant*.

The complaint of the plaintiff respectfully shows—

That in or about the month of December, 1874, and January, 1875, the plaintiff, at the request of B. B., the defendant above named, performed certain labor, and furnished certain materials upon a certain house and premises, situated in the City of Brooklyn, Kings County, New York, and that the premises aforesaid are bounded and described as follows: Beginning at a point on the northerly side of Eighteenth street, at a point distant two hundred and fifty feet from the in-

FORM NO. 18.—COMPLAINT—CONTRACTOR AGAINST OWNER.

tersection formed by the northerly side of Eighteenth Street and the easterly side of Fifth Avenue; running thence easterly along the northerly side of Eighteenth Street, twenty-five feet, thence northerly and parallel with said Fifth Avenue, one hundred feet; thence westerly and parallel with Eighteenth Street twenty-five feet; thence southerly and parallel with Fifth Avenue to the point or place of beginning.

That said materials and labor, furnished and performed as aforesaid, were reasonably worth the sum of four hundred dollars, which said sum the defendant agreed to pay to the plaintiff therefor.

That no part thereof has been paid, except fifty dollars, but there was, on the 5th day of January, 1875, and still is due to the plaintiff thereon, the sum of three hundred and fifty dollars.

That as plaintiff is informed and believes the said defendant is, and, at all times herein named, was the owner of said premises.

That within three months after the rendering of said services and the furnishing of said materials and the performance of said labor, viz.: On the 14th day of January, 1875, the plaintiff filed a notice in writing of said claim (a copy of which is hereto annexed as a part of this complaint), on the Clerk of the County of Kings, and a copy thereof was, on or about said date, likewise served upon the defendant.

Wherefore the plaintiff demands judgment, that an accounting and settlement may be had in this Court of the amount due the plaintiff for his said services and materials furnished as aforesaid; that the same may be adjudged to be a lien on said premises, and

that the interest of the said B. B. at the time of the filing and service of said notice, be sold according to law and the practice of this Court, and that the proceeds of such sale be applied to the payment of the amount found due to the plaintiff with the costs of this action, and that the residue be paid to the Clerk of this Court to wait the further order of the Court, and that the plaintiff have such further relief as to the Court may seem meet.

E. M. STEELE,
Plff's. Atty.

[Add the usual verification and attach a copy of the lien.]

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§ 238.—FORM No. 19.

COMPLAINT AGAINST OWNER, GRANTEE, MORTGAGEE AND OTHERS.

SUPREME COURT, COUNTY OF KINGS.

A. A., *Plaintiff*,
against
B. B., C. C., D. D., E. E., F. F., & G. G., *Defendants.*

Plaintiff complains of the defendant and for a cause of action alleges:—

FORM NO. 19.—COMPLAINT AGAINST OWNER AND OTHERS.

I. That, at the City of Brooklyn, between the 18th day of November, 1874, and February 14th, 1875, the plaintiff, at the request of the defendant B. B., performed work, labor, and services, and furnished materials in doing certain mason work, and furnishing stone, sills, lintels and other stone materials for said defendant; that said work, labor, services, and materials, were reasonably worth the sum of two thousand dollars; that the defendant B. B. has paid on account thereof the sum of one thousand dollars, leaving a balance due plaintiff of one thousand dollars, and that no part of same has been paid.

II. Plaintiff further alleges, that, on the 15th day of February, 1875, he filed with the Clerk of the County of Kings a notice of lien on said hereinafter described premises, for the moneys owing to plaintiff by defendant B. B., for work, labor, and materials, as aforesaid, and thereafter caused a copy of said notice of lien to be served on the defendant B. B.

III. That a copy of said notice of lien is hereto annexed, marked "A," and is made a part of this complaint.

IV. That said work, labor and services were done, and materials furnished in and about the erection and completion of a building, now situated on that certain lot, beginning at a point on the southwesterly corner of President and Court Streets, thence running westerly along the southerly side of President Street eighteen feet six inches, thence southerly and parallel with Court Street one hundred feet, thence easterly and parallel with President Street eighteen feet six inches, to the westerly side of Court Street, and thence northerly along

Court Street one hundred feet to the southwest corner of Court and President Streets, the place of beginning.

V. That said premises, above described, were, at the time the said work was done, and materials furnished, and until the filing of the notice of lien, hereinbefore mentioned, the property of and was owned in fee by the defendant B. B.

VI. That subsequent to the filing of said lien, and on the 5th day of March, 1875, the defendant B. B. conveyed by deed to the defendant C. C., the premises in question, subject to the lien of this plaintiff.

VII. That subsequent to the filing of the lien of this plaintiff, and on the 1st day of March, 1875, the defendant B. B. mortgaged a portion of the premises in question to the defendant D. D.

VIII. That the defendants C. C., D. D., E. E., F. F., and G. G., have, or claim to have, some interest in or lien upon said premises, which interest or lien, if any, has accrued subsequently to the lien of this plaintiff.

Wherefore the plaintiff demands that an accounting and settlement be had respecting the matters therein set forth of the amount due for work, labor, and materials, as aforesaid, and the judgment of this Court directing the sale of the interest of the defendant B. B., in the said premises, to the extent of the right of the said B. B., on the 15th day of February, 1875; that the proceeds of sale be first applied to the payment of the costs of this action, and the amount found to be due this plaintiff; that the residue of such proceeds be paid to the Clerk of this Court to abide the further order of this Court, and in case said proceeds of sale shall not be sufficient to pay the amount of said lien

and costs, that plaintiff have a judgment for any deficiency there may be against the defendant B. B., and for such other and further judgment and relief as may be just.

C. S. CARTER,
Att'y for Plaintiff.

City of Brooklyn, County of Kings, ss.:

A. A., being duly sworn, says that he is the above named plaintiff, that he is acquainted with the facts set forth in the foregoing complaint, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A. A.

Sworn to, &c.

[Attach a copy of the Notice of Lien.]

§ 239. **Referee's Report.**—The following is the form of report applicable to the foregoing complaint:

FORM No. 20.

REPORT OF REFEREE.

SUPREME COURT, COUNTY OF KINGS.

A. A.,
against
B. B., C. C., D. D., E. E., and F. F.

To the Supreme Court:

In pursuance of an order made in the above entitled action, bearing date June 10th, 1875, by which the

FORM NO. 20.—REPORT OF REFEREE.

above action and all the issues therein, were referred to me to hear and determine, I do respectfully report that I have been attended from time to time by the counsel of the respective parties in this action, and have heard the proofs and allegations of the respective parties, and from such proofs, and from the pleadings in this action, I do find the following facts:

First. That, at the City of Brooklyn, between the 18th day of November, 1874, and the 14th day of February, 1875, the plaintiff, at the request of the defendant B. B., and in pursuance of certain contracts with him, performed work, labor, and service, and furnished materials in doing certain work for defendant B. B., upon the premises described in the complaint, in this action, and that such work, labor, and materials were reasonably worth the sum of two thousand dollars. That the defendant B. B. paid on account thereof, prior to the filing of the lien hereinafter mentioned, the sum of one thousand dollars, and that there was due and owing to the plaintiff from said B. B., on the day said lien was filed, the sum of one thousand dollars, on account of said work, labor, and materials.

Second. That on the 15th day of February, 1875, the plaintiff filed with the Clerk of the County of Kings a notice of lien on the premises described in the complaint in this action, for the moneys owing to plaintiff from defendant B. B. for said work, labor, and materials, and caused a copy thereof to be served on said defendant B. B., and on the 27th day of May, 1875, commenced this action to enforce the same.

Third. That on the 2d day of February, 1875, the defendant D. D. filed a notice of lien in the

FORM NO. 20.—REPORT OF REFEREE.

County Clerk's Office of Kings County, on the property described in the complaint herein for materials theretofore furnished to, and labor performed for the defendant B. B., which materials and labor were used and performed upon said premises, and caused a copy of said notice to be served on said defendant B. B.; and that there is due to said D. D., on account thereof, at the date of my said report, the sum of two hundred and fifty-three dollars and fifty cents, which is a first lien on said premises.

And from the foregoing facts and pleadings in this action, I find and decide as conclusions of law:

First. That the defendant D. D. has a lien on the premises described in the said complaint in this action, by virtue of the filing and service of the notice of lien aforesaid, and by virtue of the statute in such case made and provided, in the sum of two hundred and fifty-three dollars and fifty cents.

Second. That the plaintiff has a lien upon the premises described in the complaint in this action, by virtue of the filing and service of the notice of lien aforesaid, and by virtue of the statute in such case made and provided, in the sum of one thousand dollars, with interest from the date of his said lien.

Third. That the plaintiff is entitled to judgment in this action, directing the sale of the right, title, and interest of B. B., in the premises described in the complaint in this action, to the extent of his right, title, and interest therein, on the 15th day of February, A. D. 1875, with costs.

Fourth. That out of the moneys arising from such sale the defendant D. D. should be first paid the amount

of two hundred and fifty-three dollars and fifty-one cents, with interest from the date of this report.

Fifth. That after the payment of the said amount to said D. D., that the plaintiff be first paid his costs and disbursements in this action, and that the balance of the money arising from said sale be applied towards the payment of the amount due the plaintiff, to wit, one thousand three hundred and sixty-nine dollars and fifty-six cents, besides interest from the date of this report; and the residue, after the payment of the said amounts, be paid into Court to abide the further order of the Court, and I order judgment accordingly.

August 15th, 1875.

Fees $ ——

JOHN DOE,
Referee.

§ 240.—FORM No. 21.

DECREE OF FORECLOSURE.

SUPREME COURT, COUNTY OF KINGS.

A. A., *Plaintiff,*
against
B. B., C. C., D. D., E. E., and F. F., *Defendants.*

It appearing to me that the plaintiff A. A., acquired a lien against the defendant B. B., as owner, on the 15th day of February, 1875, for the value of certain

building materials furnished by plaintiff to the defendant, and used by him upon the buildings and appurtenances hereinafter described, which said notice of lien was on said 15th day of February, 1875, duly filed in the office of the Clerk of Kings County; that on the 27th day of May, A. D. 1875, the plaintiff commenced an action in this Court for the enforcement of said lien, and duly filed summons and complaint, and notice of the commencement of said action, with the Clerk of Kings County; that issue was joined in said action, and same was, by the order of this Court, referred to John Doe, as sole Referee, to hear and determine the same; that said Referee has made his report in this action, whereby he finds that the plaintiff has a lien upon the premises described in the complaint in this action, by virtue of the lien aforesaid, and by virtue of the statute in such case made and provided, in the sum of one thousand three hundred and sixty-nine dollars and fifty-six cents, and orders judgment in this action directing the sale of the right, title, and interest of the defendant B. B. in the premises described in the complaint, and hereinafter described to the extent of the right, title, and interest that said B. B. had therein on the 15th day of February, 1875, with costs, and that out of the moneys arising from such sale the defendant F. F., who has a prior lien on a portion of said premises, be first paid the amount of two hundred and fifty-three dollars and fifty cents, with interest, from date of said Report; that after the payment of the said amount to said F. F., that plaintiff be first paid his costs and disbursements in this action, and that the balance of the money arising from said sale,

be applied towards the payment of the amount due the plaintiff:

On motion of C. S. Carter, attorney for plaintiff, it is ordered, adjudged, and decreed, that the interest of the said defendant, B. B., in the buildings and premises upon which said lien exists, to wit: All that certain lot of land situate in the City of Brooklyn, bounded and described as follows [Insert description, the same as in the complaint]: To the extent of all the right, title, and interest of the defendant B. B. therein at the time of the filing of the notice of lien aforesaid, to wit on the 15th day of February, 1875, be sold at public auction by or under the direction of the Sheriff of the County of Kings; that the said Sheriff give notice of the time and place of such sale in the manner prescribed by law, and the practice of this Court. That out of the proceeds of sale the Sheriff is hereby ordered to pay to D. D., or his attorney, the sum of two hundred and fifty-three dollars and fifty cents, and interest thereon from August 15th, 1875; and from the surplus there the Sheriff is further ordered to pay to the plaintiff or his attorneys, the sum of two hundred dollars, adjudged to the plaintiff for his costs in this action, also the sum of thirteen hundred and sixty-nine dollars and fifty-six cents, the amount so found to be due by the Referee herein, with interest from August 1st, 1875, and that the residue of said proceeds (if any) be paid to the Clerk of this Court to abide the further order of this Court. It is further ordered, that the said Sheriff make a report of such sale, and file it with said Clerk, with all convenient speed, and that if the proceeds of such sale shall be insufficient

to pay the amount of the lien of said D. D., together with this judgment, interest, and costs as aforesaid, the said Sheriff specify the amount of such deficiency in his report of sale, and that the purchaser or purchasers be let into the possession of said premises on the production of the Sheriff's deed. It is further adjudged and decreed, that the defendants and all persons claiming under them, or any or either of them, after the filing of the said notice of lien on the 15th day of February, 1870, be forever barred and foreclosed of all right, title, and interest in the said premises so sold or any part thereof.

§ 241. **Under the State Act** the enforcement of the lien is a special proceeding. The commencement of such a proceeding is by a notice of a special form not known to the Code. Although this notice represents the combined summons and complaint of an ordinary action, it does not possess all the attributes of either. The proceeding is, therefore, special, and governed by the rules of practice pertaining to actions only so far as the special statute creating the lien directs. It will be unnecessary to follow out and designate the practice under the "Buffalo," "Rensselaer" and "Onondaga" Acts. As a glance at the respective statutes will show wherein they differ from the practice under the General or State Act.

§ 242. **The Notice of Lien under the State Act** contains the same averments as that under the Kings County Act, but the form may be abbreviated thus:

FORM No. 22.

Notice of Lien by Contractor.

To the Clerk of the county of Albany, and to all others whom it may concern:

Take notice, that I, A. A., of the city of Albany, in said county, have a claim against B. B., of said city, amounting to the sum of one thousand dollars, for labor performed and materials furnished in making repairs on the dwelling-house situated in said city, and known as No. 287 State Street. That the said B. B. is the owner of the said dwelling-house and the lot upon which it stands; and that the said labor was performed and materials furnished as aforesaid, under and in pursuance of an agreement with the said B. B., and that sixty days have not elapsed since the performance and completion of said labor, and the final furnishing of said materials; and also take notice, that I have and claim a lien upon the said dwelling-house and appurtenances, and the lot upon which the same stand, as security for the amount due me, as aforesaid, in pursuance of the statute in such case made and provided.

A. A., *Claimant*,
By JOHN SHARP,
Attorney.

FORM No. 23.

Notice of Lien by Sub-Contractor.

To the Clerk of the county of Albany, and to all others whom it may concern:

Take notice, that I, A. A., of the city of Albany, in said county, have a claim against C. C. of said city and county, amounting to five hundred dollars, for lumber furnished to, and under an agreement with the said C. C., and used by him in making repairs on a dwelling-house situated in said city, and known as No. 287 State Street; that B. B. is the owner of said dwelling-house, and the lot upon which it stands; and that the said C. C. was employed by him to make the aforesaid repairs upon the said house; that sixty days have not elapsed since the final furnishing of the said lumber, as aforesaid. And, also, take notice, that I have and claim a lien upon the said dwelling-house and appurtenances, and the lot upon which the same stands, as security for the amount due me as aforesaid, in pursuance of the statute in such case made and provided.

A. A., *Claimant*,
By JOHN DOE,
Attorney.

§ 243. **The Enforcement of the Lien**, where the claim exceeds fifty dollars, may be commenced by a notice and bill of particulars entitled in either the Supreme or County Court in the county where the premises are situated. This notice and bill of particulars must contain all the elements of a complaint; and, also, a notice to the defendants, requiring them to appear in person or by attorney, within twenty days after the service thereof, and answer the same, by serving a copy of such answer, together with the notice of any set-off that he or they may have upon the claimant or his attorney, or in default thereof, that the

claimant will take judgment against such defendants for the amounts specified in the claim, with interest and costs, and for the enforcement of the lien. The parties defendant are the same as under the New York City Act. The term "having interest in the subject-matter of the action," means, all persons directly affected by the sale of the premises, if it means anything.

FORM No. 24.

NOTICE TO ENFORCE A LIEN.—CONTRACTOR AGAINST OWNER.

SUPREME COURT, ALBANY COUNTY.

A. A., *Claimant,*
against
B. B., *Owner.*

Take notice, that I, C. C., of the city of Albany, in the county of Albany, have a claim against you amounting to the sum of one thousand dollars with interest thereon from the 10th day of May, 1875, for the value of labor performed for you and materials furnished to you, at your request, at the several times, and to the amount set forth in the bill of particulars

FORM NO. 24.—NOTICE TO ENFORCE A LIEN.

hereto annexed; and which labor was performed, and which materials were furnished and used in erecting a dwelling-house upon a lot owned by you, and situated in the city of Albany, in the county of Albany, and known and designated as No. 287 State Street.

And also take notice, that within sixty days after the performance and completion of such labor, and the final furnishing of such materials, to wit: on the 7th day of June, 1875, I duly filed with the Clerk of the county of Albany, the notice required by law to effect a lien on the building and premises above mentioned, for the amount of the claim above stated, to wit, for the sum of one thousand dollars and interest, as aforesaid.

You will also take notice that you are hereby required to appear in person or by attorney, within twenty days after the service of this notice upon you, and answer the same, and to serve a copy of your answer, together with any notice of set-off that you may have upon me or upon my attorney, at his office, No. 74 State Street, Albany, N. Y., or in default thereof I will take judgment against you for the sum of one thousand dollars, with interest thereon from the 10th day of May, 1875, and the costs of this action, and for the enforcement of the said lien.

A. A., *Claimant*,
per JOHN SHARP,
Attorney.

Dated New York, June 12, 1875.

[Attach Bill of Particulars as in Form No. 25.]

FORM No. 25.

NOTICE TO ENFORCE A LIEN.—SUB-CONTRACTOR AGAINST OWNER AND CONTRACTOR.

SUPREME COURT, ALBANY COUNTY.

A. A., *Claimant*,

against

B. B., *Owner*, and C. C., *Contractor*.

Take notice, that I, A. A., of the city of Albany, in the county of Albany, have a claim against C. C., of said city and county, amounting to five hundred dollars, and the interest thereon, from the 10th day of April, 1875, for lumber furnished to the said C. C., at his request, at the time and to the amount and of the value set forth in the bill of particulars hereto annexed; and which said lumber was used by the said C. C., in erecting a dwelling-house, owned by the above-named B. B., situated on State Street in the said city and county, and known and designated as No. 287 State Street, which said lumber was furnished under and in pursuance of an agreement between the said B. B. and C. C.

And also take notice that on the 7th day of June, 1875, the above-named C. C. filed with the Clerk of the county of Albany aforesaid, a notice in writing of a claim against the above-named B. B., to the amount of

FORM NO. 25.—NOTICE TO ENFORCE A LIEN.

one thousand dollars, for labor performed and materials furnished to the said B. B. in erecting the dwelling-house above mentioned; which said materials consisted, in the greater part, of the lumber furnished by me to the said C. C. as aforesaid.

And also take notice, that within sixty days after the final furnishing of said lumber as aforesaid, to wit, on the 10th day of June, 1875, I duly filed with the Clerk of the county of Albany, the notice required by law to effect a lien on the building and premises abovementioned, for the amount of my claim against the said C. C., to wit, for the sum of five hundred dollars and interest as aforesaid.

You will also take notice, that you are hereby required to appear in person or by attorney, within twenty days after the service of this notice upon you, and answer the same, and to serve a copy of your answer, together with a notice of any set-off or claim that you may have, upon me, or upon my attorney, at his office No. 52 State Street in the city of Albany, or in default thereof, I will take judgment against you for the sum of five hundred dollars, with interest thereon from the 10th day of April, 1875, with the costs of this action and for the enforcement of the said lien.

A. A., *Claimant*,
per JOHN JONES,
Attorney.

Dated, New York, June 12, 1875.

BILL OF PARTICULARS.

Take notice that the following is the bill of particulars referred to in the annexed notice, to wit:

C. C. (*Contractor*), To A. A. (*Claimant*). Dr.

1875.

March 20,	To 5,000 feet of Spruce Boards @ 20 per M.	100
" 25,	20,000 " " " " "	400
		$500

City and County of Albany, ss.:

A. A., being duly sworn, says that he is the claimant designated in the annexed notice. That the foregoing bill of particulars is the one referred to in said notice, and that it is in all respects a true and full statement of the account between deponent and the said C. C., for materials furnished him as in said notice alleged.

A. A.

Sworn and subscribed to before me, this 12th day of June, 1875.

ANDREW VANDERZEE,
Notary Public.

§ 244. The service of the notice may be made in the same manner as that of the summons in an ordinary action, and may be made upon either the defendant or his agent. But if personal service cannot be made on account of absence from or concealment within the State, the notice may be left at the last known place of residence of the defendant, and by publication of the same in a newspaper published in

the county where the property is located for three weeks in succession; the twenty days counting from the date of the first publication.

FORM No. 26.

Affidavit for Service by Publication.

(TITLE OF CAUSE.)

City and County of Albany, ss:

George Thompson being duly sworn says, that he is well acquainted with B. B., the person named as defendant and owner in the above entitled action, that the said B. B. is now absent from the State, and has been absent for *twenty* days or more last past (*or*, that deponent has made diligent inquiry to find the said B. B., for the purpose of serving him with a copy of the notice with the bill of particulars annexed, and has been several times at his residence and place of business, with a view of making such service, and has diligently inquired and searched for him at other places, that said B. B. was well aware that deponent was attempting to make service upon him, and that he secreted and concealed himself, as deponent believes, to avoid such service).

And deponent further states, that he left on the 20th day of June, 1875, a copy of said notice and bill of particulars annexed at the last place of residence of the said B. B., with A. B., the wife of said B. B.

GEORGE THOMPSON.

Sworn to before me, etc.

§ 245. **Proceedings after Service—The Default.**—If the defendants suffer a default, the Clerk of the Court may assess the damages, the same as in an ordinary action for the recovery of a money demand on contract, upon which the Court will order judgment for the amount so awarded, together with the cost of Court. The form of the judgment by default will be given hereafter.

§ 246. The form and contents of the answer is similar to that of an ordinary action under the code. In addition to the special defenses contained in Form No. 10, Chapter XIV., the following, taken from an interesting case in this city arising under the Act of 1863, wherein the sub-contractor, under a written contract, sought to avoid the contract, and recover under a *quantum meruit*, may be useful as a reference in the preparation of an answer under any of the issues arising in that action.

FORM No. 26*a*.

ANSWER BY THE OWNER.

(TITLE OF COURT.)

A. A., *Plaintiff*,

against

B. B., C. C., & D. D., *Defendants*.

The defendant B. B., for answer and objections to

the statement of the plaintiff in the above entitled action respectfully shows to this Court:

Admission of Ownership.

First.—This defendant admits, for the purposes of this action, that she is the owner, within the meaning of the act referred to in the complaint, of the premises therein designated and described.

Admission of Contract.

Second.—That said defendant admits that she entered into a certain agreement, in writing, with the defendant C. C., in and by which said C. C. undertook and agreed to erect and finish a building upon said premises, for the contract price of one hundred and seven thousand dollars. And this defendant craves leave to refer to the said agreement as a part of her answer, and to each and every part thereof.

Denial of Sub-Contract.

Third.—The said defendant, further answering said statement, denies any knowledge or information sufficient to form a belief touching the matters alleged in the third paragraph of the said statement, or any part thereof.

Nature of Extra Work.

Fourth.—The said defendant, further answering said statement, admits that there were certain alterations made in the plans of the said building, but avers that such alterations were slight and inconsiderable, and did not change or affect in any wise the character of said building, and are readily traceable and easily shown not to have changed the nature or amount of the work;

said defendant avers that each and every alteration in the said plans was specifically agreed to by said C. C., the effect thereof noted, and the value fixed, and it was further agreed by the said C. C. that the alterations aforesaid should not in any way interfere with the effect of said contract; and said defendant expressly denies each and every allegation in said statement which alleges that the expense of erecting said building incurred by said C. C. was increased, or that the work, labor, and materials, done and furnished, upon said building, were of the value of one hundred and forty-seven thousand dollars. And the defendant further says, that in and by said building contract, above referred to, is the following clause, to wit: "It is mutually agreed that no alteration, deviation, or omission in and from this agreement shall be binding on the owner, unless directed and agreed to in writing," which part of said contract defendant hereby insists on.

Denial of Performance by Claimant.

Fifth.—The said defendant, further answering said statement, denies any knowledge or information sufficient to form a belief as to the amount of work done or materials furnished by the plaintiff and claimant, upon said building, in pursuance of his alleged contract with said C. C.

Specific Denial.

Sixth.—The said defendant, further answering said statement, denies any knowledge or information sufficient to form a belief touching the matters alleged in the sixth paragraph of said statement.

ANSWER BY THE OWNER.

Denial of Direct Liability.

Seventh.—The said defendant, further answering said statement, admits that she employed the plaintiff and claimant to do some little painting work in and about a few rooms of said building, but denies that the work, labor, and materials, done and furnished, were reasonably worth the sum of five hundred and thirty-six dollars and ninety-four cents.

Denial of Performance by Contractor.

Eighth.—The said defendant, further answering the said statement, denies each and every allegation contained in the eighth paragraph of the said statement, and each and every part thereof, and denies each and every allegation of said statement which alleges performance by said C. C. of his said agreement with this defendant.

Waiver and (Nil debet.)

Ninth.—The said defendant, further answering the said statement, denies any knowledge or information sufficient to form a belief touching the indebtedness, in said statement alleged to exist, from said C. C. to the plaintiff and claimant; and said defendant avers, on information and belief, that the plaintiff and claimant have waived their right to acquire any lien which they might have acquired under their alleged contract with said C. C.

Denial of Lien.

Tenth.—The said defendant, further answering said

statement, says that, touching the allegations of the twelfth paragraph of said statement, she denies any knowledge or information sufficient to form a belief as to whether the plaintiff and claimant have acquired a good and valid lien, as set forth in said statement, and, as she is further advised, such allegations constitute a conclusion of law, and she submits herself as to such to the judgment and findings of this court.

Eleventh.—Said defendant, further answering said statement, denies each and every allegation contained in the thirteenth paragraph of the said statement of plaintiff herein, and each and every part thereof.

Denial of Indebtedness to Contractor.

Twelfth. This defendant, further answering said statement, and as and for a separate defense, avers that at the time of the filing of the plaintiff's notice of lien, to wit, on the 17th day of June, 1874, said C. C. had been greatly overpaid under the said contract, and at that time there was not nor has there since been anything owing from this defendant to said C. C. under said contract.

General Denial.

Thirteenth. And this defendant, further answering said statement, denies each and every allegation contained in said statement not hereinbefore specifically admitted or denied, and excepting as may be hereinafter modified and qualified.

First Counter-Claim.

Fourteenth. And the said defendant, in further an-

swer and defense to the said statement, and as and for a first cause of counter-claim to and set-off against the alleged claim and indebtedness of the defendant C. C., set forth and relied upon by said plaintiff, repeats the allegations and denials hereinbefore contained, and avers that in and by the agreement in writing referred to in said statement, and in the second subdivision of this answer, between this defendant and said C. C., it was provided that said C. C. should have the building described in said contract completely finished in a good, substantial, and workman-like manner, to be testified by the certificate of the architect, on or before the 7th day of April, 1874; that it was further agreed therein, that in case the party of the second part thereto, to wit, the said C. C., should not, by the said 7th day of April, 1874, have well and faithfully completed his part of said contract pursuant to the same, he should forfeit and pay the said owner or her representatives, as fixed and liquidated damages, the sum of one hundred dollars for each and every day said contract should remain uncompleted; and this defendant further avers that the time mentioned in the said contract, within which said C. C. was to perform his part of the same, was extended by an agreement in writing, between this defendant and said C. C., for two weeks upon certain parts of said building, to wit, till the 21st day of April, 1874, and this defendant avers that this defendant fully performed her part of said contract, but that nevertheless the said C. C. wholly failed to complete his part of the same, or to have the said building, or any portion of said building, completely finished on or before the 7th day of

April, 1874, or on or before the 21st day of April, 1874, and that by reason of the default of the said C. C., the said contract and said building remained uncompleted until the 23d day of September, 1874, that by reason of said default and of the said noncompletion of said contract and of said building this defendant was prevented from occupying or renting out the said building or any part thereof on the 1st day of May, 1874, as she would have been able to do had the same been completed on the 21st day of April, 1874, nor was she able to rent or occupy the same or any part thereof, or derive any benefit therefrom until the 23d day of September, 1874, to the actual damage of this defendant, in a sum far greater than the damages liquidated and fixed to be paid for such default and noncompletion, to wit, in the sum of twenty-three thousand seven hundred and twelve dollars and fifty cents.

Second Counter-Claim.

Fifteenth. And this defendant, in further answer and defense to the said statement, and as and for a second cause of counter-claim to and set-off against the alleged claim of the defendant C. C., as set forth and relied upon by said plaintiff, repeats the allegations and denials hereinbefore contained, and avers that in and by the said agreement in writing, it was further provided that if the said C. C should, at any time during the progress of the work, refuse or neglect to supply a sufficiency of materials or workmen for the purposes of said contract, then that this defendant should have the power to provide workmen and materials to finish the work provided by said contract to be

done, the expense to be deducted from the amount payable by this defendant under the contract; and that in case the said building and the said contract should not be completely finished by said 7th day of April, 1874, this defendant should be at liberty to take possession of the work and materials on hand, and complete said contract, and charge said C. C. with the extra cost thereof. And this defendant avers that the said C. C. not only failed to complete said contract on or before the said 7th day of April, 1874, and on or before said 21st day of April, 1874, as above set forth, but did, in or about the latter part of the month of June, 1874, abandon work under his said contract, and utterly failed in respect thereto, and every part thereof, and refused and neglected to furnish labor and materials to finish said work, and that by reason of said default, failure, abandonment, and refusal, this defendant thereupon was compelled to, and did complete said building and the work agreed to be performed by said C. C., under the contract aforesaid, and that by reason of said default, failure, abandonment, and neglect, and the great amount of said contract work left unperformed by said C. C., and the manifest disadvantage under which this defendant assumed and continued the said work after said default, abandonment, and neglect, this defendant was obliged to and did expend and disburse, in order to finish said building as called for by said contract, a large sum, to wit, the sum of nineteen thousand dollars over and above the amount paid to said C. C., under said contract prior to his said default, which sum of nineteen thousand dollars, this defendant claims, should be charged to

said C. C. under said contract, as well as the said amount previously paid to said C. C.; that said sum, together with the amounts paid to said C. C. as aforesaid, amounted to one hundred and twenty thousand two hundred dollars and twenty-three cents, being thirteen thousand two hundred dollars and twenty-three cents in excess of the contract price named in said agreement.

Wherefore this defendant prays:

1st. That the proceedings of the plaintiff be dismissed, with costs.

2d. That it be adjudged and decreed by this Court that this defendant is not indebted, under said contract hereinbefore described, to said C. C., contractor and defendant herein, in manner and form as in said statement of plaintiff's claim is set forth, or in any sum whatever, and that said plaintiff and the claimants, who are defendants herein, have no lien upon the premises referred to in said statement, for any claims or demands arising out of the said contract, or for any claims or demands whatever, and that all notices of lien upon said premises heretofore filed by said plaintiff or the said claimants defendants herein, in the office of the Clerk of the City and County of Albany, under the Act of the Legislature of this State referred to in said complaint, or any other act, be discharged and canceled of record in the said office.

3d. That it be further adjudged and decreed that the said defendant C. C. is indebted to this defendant in the sum of fifteen thousand five hundred dollars, with interest thereon from the 23d day of September, 1874, by reason of the matters and facts set forth as a first

cause of counter-claim herein, and in the further sum of thirteen thousand two hundred dollars and twenty-three cents, with interest from the day last aforesaid, by reason of the matters and facts set forth as a second cause of counter-claim herein, and that the sum thereof, to wit, the sum of twenty-eight thousand seven hundred dollars and twenty-three cents, with interest as aforesaid, be set-off against the claim of C. C. under said contract, should any portion of his said claim be made good.

4th. That this defendant have judgment against said C. C. for the said sum of twenty-eight thousand seven hundred dollars and twenty-three cents, with interest from said 23d day of September, 1874, besides costs, and that this defendant have such other and further relief as may seem just to this Court.

§ 247. The Trial of the Issues.—Where one or more of the defendants appear and answer, the trial is conducted as in an ordinary action on contract.

FORM No. 27

Report of Referee.

SUPREME COURT, WESTCHESTER COUNTY.

A. A.,

Plaintiff,

against

B. B.,

Defendant.

I, John Doe, sole Referee in this action, to whom it was referred by an order of this Court, dated the 17th day of June, 1874, by which it was ordered that the issues in this action be referred to me, as sole Referee, to hear and determine the same, respectfully report that after hearing the proofs of the parties, and the arguments of their respective counsel, I find and determine as facts:

That between the first of October, 1873, and the first day of August, 1874, the plaintiff performed work and labor, and furnished materials in and for the erection of a dwelling-house and barn upon the land and premises owned by the said defendant, in the town of Morrisania, in the county of Westchester, and State of New York, known as lots number sixty-three, sixty-four, and sixty-five, on a map of Highbridgeville, filed

in the office of the Register of the county of Westchester; that the said work and labor were so done and performed, and materials furnished by the said plaintiff for the said defendant, and at the request of the said defendant, and that they were fairly and reasonably worth the sum of twenty thousand one hundred and twenty-nine dollars and forty-seven cents, and that the said defendant has paid on account thereof, and to and for the use of the said plaintiff, altogether the sum of ten thousand six hundred and seventy-two dollars and forty-nine cents; that there still remains due and owing and payable by the said defendant to the said plaintiff for and on account of the said value of the said work, labor, and materials, the sum of nine thousand four hundred and fifty-six dollars and ninety-eight cents, with interest thereon from the fourth day of May, 1867, making in all, at the date of this my report, the sum of ten thousand one hundred and thirty-three dollars and sixty-two cents; that within thirty days after the performance and completion of the said labor, and the final furnishing of the said materials, to wit, on the ninth day of August, 1866, at eight o'clock in the forenoon, the said plaintiff duly served upon the County Clerk of the said county of Westchester (that being the county where the said property is located) a notice in writing, in all respects in conformity with the Fourth Section of the Act entitled, "An Act for the better security of Mechanics and others erecting Buildings in the Counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess," passed April 17th, 1854, for the purpose of

acquiring a lien under the provisions of said Act for eight thousand seven hundred and forty-three dollars of the amount so due as aforesaid by the said defendant to the said plaintiff for the said work, labor, and materials upon the said dwelling-house and barn and appurtenances, upon the said three lots of ground upon which the same stand, specifying the amount of his said claim to be the said sum of eight thousand seven hundred and forty-three dollars, and specifying the said defendant as the owner of the said buildings, and the person against whom the said claim was made, together with a legal and sufficient description of the said buildings, and of the said three lots of ground upon which the same stand, and that the said County Clerk of the said county of Westchester thereupon, to wit, on the said ninth day of August, 1866, at eight o'clock in the forenoon of that day, duly filed the said last-mentioned notice in writing in his office in all respects as required by the said Fourth Section of the said Act, and duly entered the particulars of said notice in a book kept in his office, and called the "Lien Docket," in compliance with the provisions of said Act.

And as conclusion of law therefrom, I find that the plaintiff acquired, and now has a lien, in pursuance of said Act, for the said eight thousand seven hundred and forty-three dollars of the value of said work and materials upon the said dwelling-house and barn, and appurtenances, and upon the said three lots of land upon which the same stand, to the extent of the right, title, and interest of the said defendant, the owner of the said property at the time of filing the said notice of lien, to wit, on the said ninth day of August, 1866,

at eight o'clock in the forenoon, together with interest on the said sum of eight thousand seven hundred and forty-three dollars from the fourth day of May, 1867, which interest amounts, at the date of this, my report, to the sum of six hundred and twenty-nine dollars—making, in all, the sum of nine thousand three hundred and seventy-two dollars, for which last-mentioned sum the plaintiff is entitled to have judgment entered against the said defendant, with costs, and execution thereon, to sell the right, title, and interest which the owner, the said defendant, had in the premises at the time of filing the notice, prescribed by the first section of the said Act, as aforesaid, and judgment is ordered accordingly.

JOHN DOE,
Referee.

Dated May 14, 1875.

FORM No. 28.

Report of Referee—Short Form.

SUPREME COURT, WESTCHESTER COUNTY.

(TITLE OF THE CAUSE.)

I, John Doe, sole Referee in this action, duly appointed by the Court to hear and determine the same, do certify and report that I have been attended by the respective parties and their counsel, and have heard the proofs and allegations, and I find for fact that all the allegations and statements made in the notice and

FORM NO. 28.—REPORT OF REFEREE—SHORT FORM.

bill of particulars of the plaintiff in this action, served upon the defendant therein to foreclose his lien, set up in said notice, are true as therein made, and that the amount claimed in the notice filed with the County Clerk of the county of Westchester, on the ninth day of August 1874, for the purpose of securing a lien to the plaintiff upon the buildings, lands, and appurtenances mentioned and described in the said notice, to wit, the sum of eight thousand seven hundred and forty-three dollars, is due and owing from the said defendant to the said plaintiff for the work, labor, and services done and performed, and the materials furnished, as the same are set forth and claimed in said notice and bill of particulars, and in said lien.

That on the ninth day of August, 1874, the plaintiff in this action filed in the office of the County Clerk of the county of Westchester the notice required by law, to secure a lien upon the lands and premises of the defendant, mentioned and described in the notice of the plaintiff, by which this action was commenced, to the amount of eight thousand seven hundred and forty-three dollars.

I find, as conclusion of law, that the plaintiff is entitled to judgment against the defendant in this action, for the sum of eight thousand seven hundred and forty-three dollars with interest thereon from the ninth day of August, 1874, making in all nine thousand three hundred and forty-two dollars, besides the cost of this action, for which sum let judgment be entered.

(Signed) JOHN DOE,
Referee.

Dated, August 1, 1875.

PERSONAL JUDGMENT.

§ 248.—**The Judgment.**—In case of default the statute provides that upon the assessment of damages by the Court, or Justice, as the case may be, judgment shall be entered thereon establishing the amount of said lien with the costs; and execution shall thereupon issue for the enforcement and collection of said claim so adjudicated and established, in the same manner as executions upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest which the owner or other person in interest had in the premises at the time of the filing of the notice of lien. Where the issue has been joined in a court of record, the statute (§ 15) gives the Court power to ascertain and declare the interests of the several claimants, if more than one, in the moneys due or to grow due from the owner or other person interested in the premises, and the priority and amounts of their respective liens, as well as to adjudge or decree the particular person or persons entitled thereto, and to declare the interests of all parties who have been made parties to the proceedings, and to conclude the whole controversy in one final decision, and for that purpose to render judgment or make such order or decree in favor of or against any one or more of the parties severally or jointly as may be just, leaving the action to proceed against the other party or parties, and may order separate trials between any of the parties in its discretion. Notwithstanding this power given to the Court, which is similar to that prescribed under the New York City law, the preceding section nominally restricts its operation by specifying that the judgment

shall be entered in form as in other actions arising on money demands on contract. This difficulty is obviated by framing the execution after the decree that *should have been* entered, "and judgment shall be enforced if for the claimant, as provided by this act" (§ 14). Section seventeen provides that a transcript of the judgment may be filed in any other county and the same shall thereafter be a lien upon the real property in such county in like manner and to the same extent as in other actions arising on contract. This in effect gives the judgment all the powers of an ordinary judgment on contract.

§ 249. —**Personal Judgment.**—Under the State Act the judgment is *in personam* as well as *in rem*, and has all the force and potency of a common law judgment. Under the New York City Act of 1863, the judgment *in personam* was separate and distinct from the judgment *in rem*, and might be entered for or against any of the parties to the foreclosure under their separate personal liabilities. Under the State Act the usual form of judgment is prescribed; but separate executions may doubtless be issued to the same effect as under the New York City Act. The sub-contractor is also entitled to a personal judgment against the owner. The lien acts as a garnishment of the owner's debt to the contractor, and permits the sub-contractor to enter judgment against the owner for so much thereof as the contractor is indebted to him. But it must be borne in mind that the enforcement of the lien is not an action under the Code, and that the Court has therefore no power to enter the ordinary judgment without the claimant alleges and proves the

existence of a valid lien and all the facts that would entitle him to enforce it under the statute. The fact that a valid lien must exist to give the Court jurisdiction is unquestioned; but whether once having jurisdiction a general judgment can be rendered upon the contract without regard to the subsequent discharge of the lien, is not so clear. The Supreme Court has held that it cannot.* It is plain that a sub-contractor cannot enter judgment against the owner after his lien fails,† as that is the only connecting link between them. The judgment cannot be for a larger amount than that named in the lien, with interest and costs added; and probably not for a larger amount than the lien can be enforced for.

FORM No. 28*a*.

JUDGMENT ON REFEREE'S REPORT.

SUPREME COURT, WESTCHESTER COUNTY.

A. A., *Claimant*, *agst.* B. B., *Owner*.	*Judgment August 6th*, 1867.

This action being at issue upon the claimant's notice

* Grant *v.* Vandercook, 57 Barb., 165; Huxford *v.* Bogardus, 40 How., 94. The rule was different under the New York City Act of 1863, Barton *v.* Herman, 3 Daly, 320; Schartzler *v.* Gardiner, 47 N. Y., 404.

† Mushlitt *v.* Silvermann, 50 N. Y., 360.

and bill of particulars to enforce his lien, and the owner's answer and bill of particulars of set-off annexed thereto, and the issue being an issue of fact triable by the Court, and the cause having been referred to John Doe as sole Referee to hear and determine the same, and the same having been tried before the said Referee, and the said Referee having made his report in writing therein, which has been duly filed, whereby he finds that there is due from the said owner to the said claimant the sum of eight thousand seven hundred and forty-three dollars, with interest thereon from the ninth day of August, 1874, making in all nine thousand three hundred and forty-two dollars, for which last named amount, together with the costs of this action, judgment was ordered against the said B. B., owner, in favor of said A. A., claimant—

Now, on motion of John Jones, the attorney for the above-named claimant, it is hereby adjudged that the said A. A., claimant, recover of the said B. B., owner, the aforesaid sum of nine thousand three hundred and forty-two dollars.

JOSEPH JOHNSON,
Clerk.

FORM No. 29.

JUDGMENT ON TRIAL BY THE COURT.

(TITLE OF CAUSE.)

Judgment, August 1, 1875.

This action being at issue upon the claimant's notice and bill of particulars to enforce his lien, and the

owner's answer and bill of particulars of set-off annexed thereto; and the issue being an issue of fact, and triable by the court, and such issue being tried by the court on the twentieth day of July, 1875, the Hon. C. R. Ingalls, Justice, presiding, whose decision in writing has been filed with the Clerk of this Court, whereby judgment is ordered against the said B. B., owner, in favor of A. A., the above named claimant, for five hundred dollars, with costs and disbursements against said owner to be taxed.

Now, on motion of John Jones, attorney for A. A., the above plaintiff, it is ordered and adjudged that the said plaintiff recover of B. B., the owner above named, the aforesaid sum of five hundred dollars, together with the sum of one hundred dollars costs and disbursements, amounting in the whole to the sum of six hundred dollars.

FORM No. 30.

JUDGMENT ON DEFAULT.

(TITLE OF CAUSE.)

Judgment, August 1, 1875.

The notice and bill of particulars in the above action having been personally served on B. B., the owner and defendant above named, more than thirty days previous to this date, and no copy of an answer of the same having been served upon the plaintiff's attorney, as required by said notice, and due proof of the service of such notice and bill of particulars, and of the

FORM NO. 30.—JUDGMENT ON DEFAULT.

defendant's failure to appear as aforesaid, having been made and filed; and the plaintiff having also given evidence, showing that he has acquired a valid lien upon the building and premises of the defendant, situated in the city of Albany, in the county of Albany, and which premises are particularly described in said notice; and also evidence to establish the value of the labor performed [*or* materials furnished] by the plaintiff, as stated in said notice, and that the same was performed for [*or* were delivered to] the said defendant [*or* C. C., the original contractor with said defendant, as stated in said notice] in the erection of the building above mentioned, and the appurtenances thereto; and the plaintiff's claim having been assessed by the Court [*or* by the Clerk of said county] at the sum of five hundred dollars.

Now, therefore, on motion of John Sharp, attorney for the plaintiff, it is ordered and adjudged that the plaintiff recover of B. B., the owner and defendant above named, the sum of five hundred dollars, with fifty dollars costs and disbursements, amounting in the whole to five hundred and fifty dollars.

§ 250. **The Execution** is either general or special. A general execution may be issued in the ordinary form, where the defendant recovers judgment for costs against the plaintiff; so an ordinary execution may issue against all the real estate of the owner for the enforcement of the judgment against him as of the date of its recovery. And a special execution may also issue directing the sale of the premises charged with the lien as of the date of its filing.

FORM No. 31.

Execution against the Property Covered by the Lien.

The People of the State of New York to the Sheriff of the County of Albany.

Whereas, judgment was rendered in the County Court of the County of Albany, on the 10th day of September, 1875, for the sum of eleven hundred dollars, in favor of A. A., and against B. B., in an action commenced against the said B. B., as owner, to enforce a lien existing under the statute, in favor of the said A. A., as claimant, against the building known as No. 287 State Street, in the city of Albany, in said county, and the lot upon which the same stands, which lot and premises are bounded and described as follows, to wit: [insert description].

And whereas, the said B. B. was owner of the said building and premises on the day upon which said lien was created, to wit: on the tenth day of June, 1875.

And whereas, the said judgment was docketed in your county on the tenth day of September, 1875, and there is now actually due thereon the sum of eleven hundred dollars, with interest thereon from the tenth day of September, 1875.

Therefore, we commend you that you sell the right, title, and interest which the said B. B., owner as aforesaid, had in the building and premises above mentioned, at the time the notice creating said lien was filed, to wit: on the tenth day of June, 1875, and out of the

avails of said sale, that you satisfy the amount of said judgment, and return this execution, with your proceedings thereon, to the Clerk of the county of Albany, within sixty days after the receipt thereof by you.

JOHN SHARP,
Att'y for Plaintiff and Claimant, A. A.

§ 251. Proceedings in Justice's Court.—Where the claim is under two hundred dollars it may be enforced in the Justice's Court of the town or city in which the premises are located, and for the purposes of this Act that court has personal jurisdiction throughout the State. The Act fails to note the distinction that exists in many of the cities between a Justice's Court and a Justice of the Peace. It first specifies that the Justice's Court has jurisdiction, and then states that the defendant shall be required to appear before said "*Justice in person;*" as other sections of the same statute seem to personate the justice only, the jurisdiction is undoubtedly vested in the officer instead of the Court.

FORM No. 32.

NOTICE TO ENFORCE THE LIEN IN JUSTICE'S COURT.

C. C.,
Claimant,
against
B. B.,
Owner.

In Justice's Court, before FRANK WOODS, Justice.

To B. B., above-named, owner of the building and premises hereinafter mentioned:

Take notice, that I, C. C. above named, residing at Albany in the county of Albany, have a claim against you amounting to the sum of two hundred dollars, with interest thereon, from the 20th day of May, 1875, for two months' labor performed for you as a carpenter and joiner [*or*, for lumber furnished to you], in pursuance of an agreement with you, the same being fully set forth in the bill of particulars hereto annexed; and which labor was performed [*or*, which materials were furnished] in erecting the building owned by you situated in the city of Albany, in said county and known as No. 287 State Street, the lot upon which the same stand being bounded and described as follows: [describe premises.]

Also take notice, that within sixty days after the performance and completion of such labor [*or*, the

final furnishing of such materials], to wit: on the 25th day of May, 1875, I duly filed with the Clerk of the county of Albany, the notice required by law to effect a lien on the building and premises above mentioned, owned by you as aforesaid, for the amount of the claim above stated, to wit: for the sum of two hundred dollars, and interest, as aforesaid.

Also take notice, that you are required to appear, in person or by attorney, before Frank Woods, Esq., a justice of the peace in and for said city, at the Justice's Court in said city, on the 20th day of June, 1875, at 10 o'clock, A. M., and answer this notice, or in default thereof, I, the said claimant, will take judgment against you for the sum of two hundred dollars and interest thereon, from the 20th day of May, 1875, with costs.

C. C., *Claimant.*

Dated at Albany, this 25th day of May, 1875.

[Annex verified bill of particulars.]

§ 252. **The Answer and Trial in Justice's Court** is the same as in an ordinary action, but the judgment and execution is in the form, and enforced in the same manner as in the proceedings for the enforcement of a lien in courts of record. In case of default, judgment may be rendered upon due proof, by affidavit, of the service of the notice and statement of claim, and of the non-appearance of the defendant within the time prescribed by the statute.

FORM No. 32*a*.

Affidavit of Default.

City and County of Albany, ss.:

A. A., above named, being duly sworn, says he is the plaintiff in the above action. That this action was commenced to enforce a Mechanics' Lien against real property owned by the defendant above named; that the notice commencing the same was made returnable before Frank Woods, Esq., Justice of the Peace at the Justice's Court in the city of Albany, on the 30th day of June, 1875, at 10 o'clock, A. M., as will more fully appear by said notice hereto annexed.

Deponent further says that the said B. B., has not appeared before the said justice as required by said notice, and that one hour and over has elapsed since the time fixed in said notice for the appearance of said defendant.* A. A.

Sworn, etc.

§ 253.—**Costs** are entirely within the discretion of the Court, and may be awarded for or against any of the parties.

§ 254.—**An Appeal** may be taken from the judgment, which will be governed by the ordinary rules applicable to appeals under the code, except that it will not stay proceedings of any of the parties or claimants (§§ 23, 24, ch. 489, Laws of 1873).

* The Author is indebted to the learned Author of Crary's Special Proceedings, and also to Wm. Wait, Esq., for permission to use the frame-work of several of their forms in the preparation of this chapter.

§ 255. **Marshaling Securities.** Whenever a creditor has a choice of two funds, Equity requires him to so exercise his right of election as not to injure other creditors who can resort to only one of those funds. The remedy, where he exhausts the fund applicable to other creditors, in such a case, is to place them in his situation, so far as he has applied their funds to the satisfaction of his claim. This principle is usually applied and enforced in the case of mortgages, but it applies equally well to mechanics' liens.* Thus, where a mechanics' lien was filed upon a building erected upon one of two adjoining lots covered by a prior entire mortgage, the Court held that the other lot should be first sold under the mortgage, leaving the value of the second lot with the building thereon for the payment of the lien.†

§ 256. **The Principle of Subrogation between Principal and Surety** also applies to mechanics' liens.

* Olympic Theater, 2 Browne (Penn.), 275; Hamilton *v.* Schwehr, 34 Md., 107; Kenny *v.* Gage, 33 Vt., 307.

† Olympic Theater, 2 Browne, 275.

And a senior lien-holder, by payment of junior liens and incumbrances, is subrogated to all the rights and privileges pertaining to them.* From this principle of equitable substitution, it has been held that one holding a claim primarily for his own security, and next for the indemnity of others, has no right so to deal with it as to impair that indemnity, and that he may be held to strict accountability for any loss they may suffer, if he does so impair it.† The creditor may, if he has no other remedy, compel the appropriation to the payment of the debt of the fund or lien held by the surety for his indemnification.‡

§ 257. **The Application** of the principles applicable to the marshaling, subrogation, and apportionment of liens may be exercised by the Court, under the prayer for general relief upon the facts arising in a given case. Even though not pleaded by the parties, it is entirely within the equity powers of the Court.

§ 258. **The Limitation of the Lien.** Under the State Act, the lien expires in one year, unless an action is commenced thereon within the year, in which case it does not expire until one year after the recovery of judgment thereon. Under the King's and Queen's Act, the provision is the same, except that it expires upon the recovery of the judgment.

The same provision in effect, exists under the Buffalo Act. But in Rensselaer County, the period of limitation is five years. Although no limitation is prescribed

* Russell *v.* Howard, 2 McLean, 489.

† Chester *v.* Kingston, 17 Barb., 271.

‡ Matthews *v.* Aiken, 1 Comstock, 595; Belcher *v.* Hartford Bank, 15 Conn., 381.

under the Onondaga Act, the claimant must commence the foreclosure *within six months* from the completion of his contract. It is therefore practically outlawed in six months, without suit is then commenced. The "Cities'" Act of 1880 provides for the commencement of the action within one year, unless the time is extended by the Court. Many interesting questions received the consideration of the Courts under the former limitation of one year, existing under some of our Statutes; but as the value of such decisions passed away with the Acts upon which they were founded, it will be needless to cite them here.

§ 259. **The Discharge of a Lien.—1st. By Certificate.**—Whenever the lien is satisfied by the parties or otherwise it may be discharged of record by filing with the County Clerk a duly authenticated certificate to that effect. The acknowledgment must be the same as in a satisfaction of a mortgage.

FORM No. 33.

Satisfaction of a Lien.

I, A. A., Claimant, do hereby certify, that a certain Mechanics' Lien, filed in the office of the Clerk of the *city and* county of *New York*, the *10th* day of *May*, one thousand eight hundred and *seventy four*, at *eight* o'clock in the *fore*noon in favor of A. A., claimant against the building and lot situated on the *south side* of *East Eighteenth* Street, *in the Tenth Ward of the city of New York, between the Fifth and Sixth Avenues*,

and known as No. 24 in said street, *in which B. B. is named as* owner *and C. C. as* contractor, is fully satisfied and discharged.

A. A., *Claimant.*

City and County of New York, ss. .

On the 20*th* day of *November*, one thousand eight hundred and *seventy-five* before me came A. A. *to me personally known, and known to me* to be the individual described in, and who executed the above certificate, and acknowledged that *he* executed the same.

JOHN BROWN,
Notary Public,
New York County.

§ 260. **2d. By Deposit.**—The lien may also be discharged by depositing the amount claimed, together with interest and Court costs, if any has accrued, with the County Clerk, who thereupon makes an entry to that effect in the Lien Docket.

§ 261.—**3d. By Filing Security.**—In New York City, under the Act of 1875, the lien could be discharged after the commencement of the action by the execution and delivery to the Clerk, under the order of the Court, of a surety bond conditioned for the payment of any judgment that may be rendered against the property in the action, and by an order thereupon issued directing the discharge of the same.

It is evident that this proceeding must be taken after the commencement of an action, as it is specially made a substitute for Subdivision three of Section eighteen, and provides for the payment of any judg-

ment rendered in the action. There is no provision for securing a discharge by filing the bond before the action is commenced. Nor in any event without the order of the Court is first obtained directing the execution and delivery of the bond and specifying the amount for which it shall issue. As the amount of the bond is important to the claimants, this preliminary order should only be granted on due notice to them.

FORM No. 34.

PROCEEDINGS FOR THE DISCHARGE OF LIEN BY FILING SECURITY.

AFFIDAVIT AND ORDER TO SHOW CAUSE.

SUPREME COURT, COUNTY OF NEW YORK.

A. A.,
Plaintiff,
against
B. B. and D. D.,
Defendants.

City and County of New York, ss.:

B. B., being duly sworn, says that he is the owner of the premises designated in the notices of claim hereunto annexed, marked "Exhibit A" and "Exhibit B," that an action is pending for the enforcement of said claims against the premises therein mentioned, that

the said claims amount in the aggregate to the sum of five hundred dollars, and that the interest on said claims to this date amounts in the aggregate to the additional sum of one hundred dollars, making in all the sum of six hundred dollars. That deponent has filed an answer in this action denying that the said claims are valid and existing liens against said premises, for any sum or amount whatsoever. Wherefore deponent prays that an order may be issued by the Court directing the execution and delivery of a bond to the Clerk of the Court of the city and county of New York, in such sum as to the Court may be deemed just, conditioned for the payment of any judgment that may be rendered against the property designated in said notices, and that upon the approval thereof the said apparent liens be discharged of record.

B. B.

Sworn to, etc.
Dated May 10th, 1875.

Order to Show Cause.

(TITLE OF THE CAUSE.)

On the foregoing affidavit and the papers thereto annexed, let the plaintiff and the defendant D. D. show cause, if any they have, before me or one of the justices of this court, at a special term at the chambers thereof in the new County Court House in said county, on the 15th day of May, at 12 o'clock noon, of that day, why an order should not issue directing the execution

and delivery of a bond as set forth in said affidavit in the penal sum of *seven hundred and fifty dollars*, as a security for any judgment that may be rendered against the property set forth in the notices of claim thereto annexed.

JOSEPH DONOHUE,
J. S. C.

FORM No. 35.

Order Requiring the Execution of the Bond.

(TITLE OF THE CAUSE.)

At a special term, etc.

On reading and filing proof of due service upon each of the claimants interested herein, of a copy of the affidavit and order to show cause, filed and entered herein on the 10th day of May, 1875, and on motion of John Sharp, attorney for the defendant B. B.,

It is ordered that the defendant B. B. forthwith execute to the Clerk of the city and county of New York, a bond in the penal sum of seven hundred and fifty dollars duly signed and executed by two good and sufficient sureties, and conditional for the payment of any judgment which may be rendered in this action against the property designated in the respective claims filed by the claimants herein, and more fully set forth in the complaint in this action.

JOS. DONOHUE,
J. S. C.

Dated May 15, 1875.

The bond is practically the same as an ordinary appeal bond to secure the payment of the judgment. Upon the justification of the sureties in the manner prescribed by the statute, and the approval of the Court indorsed on the bond, the Court will make an order discharging the lien of record; and the Clerk will then make an entry to that effect on the Lien Docket. This proceeding is not applicable to the "Cities' Act" of 1880.

§ 262. **4th.—By Notice and Default.**—Under nearly all our statutes the owner may require the claimant to commence the foreclosure suit within a specified time upon the pain of a forfeiture of the lien. The proceedings in such a case under the King's and Queen's Act, have been given. Under the State Act, the claimant must commence his action within twenty days from a receipt of the notice; or, where service is by publication, within six weeks from the time of the first publication. No provision of this nature exists under the "Cities' Act" of 1880.

FORM No. 36.

Notice by Owner under the State Act.

To A. A., Claimant.

You will take notice that you are required, within twenty days after the service of this notice, to commence an action to enforce a lien created by you, on the tenth day of May, 1875, against the building, No. 287 State Street, in the city of Albany, and appurte-

nances, and the lot upon which the same stand, owned by me, to secure an alleged claim for fifty dollars, alleged to exist against me the said B. B., as owner (*or*, against C. C., as contractor).

The building and premises above-mentioned are described in the notice creating said lien, as follows: [insert description].

B. B., *Owner*.

Dated, etc.

FORM No. 37.

Affidavits of Service and Default.

City and County of Albany, ss.:

John Brown of Albany, in said county, being duly sworn, says: That, on the twentieth day of May, 1875, he personally served a notice, of which the above is a copy, upon A. A. [*or* C. C.], the claimant mentioned therein, by delivering the same to, and leaving the same with, the said A. A. [*or* C. C.], at his residence, in the city of Albany, in said county. And deponent further says, that he knew the person so served to be the person mentioned and described in said notice as claimant therein.

Sworn, etc. JOHN BROWN.

City and County of Albany, ss.

B. B., being duly sworn, says: That more than twenty days have elapsed since the service of the notice mentioned in the affidavit of John Brown hereto annexed; and that no action has been commenced

against him to enforce the lien mentioned in said notice.

B. B.

Sworn, etc.

FORM No. 38.

Notice by Owner in Justice's Court.

To all persons having claims under any of the provisions of the act entitled "An Act for the better security of Mechanics and others erecting Buildings in either of the Counties of this State, except the Counties of Erie, Kings, Queens, New York, and Onondaga," passed April 17th, 1854, or of the acts amendatory thereof, against the building No. and appurtenances owned by the undersigned, and the land upon which the same stand, and which is situated in the city of Albany, in the county of Albany, and is described as follows: [insert description] at the time of the first publication of this notice, to wit: the 10th day of May, 1875.

Take notice, that you are required to present the said claims, with vouchers in support thereof, to Frank Woods, Esq., a justice of the peace of said city, at the Justice's Court, in said city, on or before the 10th day of July, 1875.

B. B., *Owner.*

Dated, etc.

FORM No. 39.

NOTICE BY OWNER AND ORDER TO SHOW CAUSE, UNDER THE NEW YORK CITY ACT. OF 1875.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER OF THE DISCHARGE OF A LIEN FILED BY A. A., *Claimant.*

To A. A., the claimant above named.

Take notice that you are hereby required to commence an action for the enforcement of the claim filed by you against the premises known as No. 18 West Thirty-first Street, in the city of New York (a copy of which claim is hereunto annexed marked "Exhibit A"), before the 10th day of July, 1875, or show cause before one of the justices of this Court at a special term to be holden at the chambers thereof in the New County Court House of the city and county of New York, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the said claim should not be vacated and canceled of record, and why such other and further relief should not be granted in the premises as may be just and equitable.

B. B., *Owner.*

Per JOHN SHARP, *Attorney.*

PROCEEDINGS AFTER SERVICE OF THE NOTICE.

Upon due proof of the service of the notice and order to show cause, and also upon the affidavit of the owner or his attorney, showing that an action has not been commenced to enforce the claim, the Court will make an order in the usual form vacating the lien, and canceling it of record.

The absence of this provision in the Cities' Act of 1880 is but one example of the deficiencies of that illy-formed act. A lien may be filed in any of our cities, out of mere spite, and without a shadow of right, and the owner's title must be clouded for a year before he can force an issue upon it.

The lien may also be discharged under any of our statutes by the entry of a judgment against the claimant thereon. So, under the State Act, the lien is vacated by the County Clerk entering in the lien-docket a statement that the proceedings by the claimant have been dismissed by the Court.

PART III.

MECHANICS' LIEN STATUTES.

NATURE AND EFFECT OF THE STATUTES.

CHAPTER XV.

RULE OF CONSTRUCTION.

§ 263. **The Rule in this State.**—There is no reason why there should not be harmony in judicial decisions relating to the rule of construction, applicable to Mechanics' Lien Acts. Yet we find a diversity of opinion in the different States, and sometimes in the Courts of a single State. On the one hand a liberal policy is adopted, so as to bring every analogous subject within the scope of what is termed a "wise and equitable system of jurisprudence." On the other, the most stringent rules are enforced, to reduce to the smallest compass the effect of a "harsh, discriminating and unjust statute."

In this State there is an apparent contrariety of opinions. In the lower Courts the provisions of the Statute have been construed, both *strictissima juris* (1), and liberally, without apparent regard to precedent. The rule in the Court of Appeals, while favoring strictness, occasionally tempers justice with mercy. Thus, in Hubbell *v.* Schreyer, (Court of App., Feb., 1874, 15 Abb. N. S. 300), cited by counsel favoring a liberal construction, the Court says: "The Statute * * * is a re-

medial one, as furnishing a summary remedy for the recovery of the claims provided for; and while it is to be strictly construed so far as to require a substantial compliance of every material provision by which the property of a third person may be encumbered, and a cloud put upon his title by the mere act of the claimant, it is not to be so strictly and hypercritically interpreted as to deprive creditors of the benefit intended to be conferred. It is to be construed in the same spirit with which it was enacted, and so to carry out the benign intent of the Legislature, while nothing is to be taken by implication against the owner, or to the prejudice of his substantial rights, or so as to extend to persons and claims not clearly within its terms."

The case usually cited by the strict constructionists is Mushlitt *v.* Silverman (50 N. Y., 360), in which the same Court says:

"The lien claimed by the plaintiffs is the creature of Statute, and depends solely for its validity upon the act creating it. The act is an innovation upon the common law, affecting property and rights of property, authorizing, as it does, property to be encumbered without or against the consent of the owner, and without a resort to legal process or judicial action. Such an act cannot be extended, in its operation and effect, beyond the fair and reasonable import of the words used; and the plaintiffs, asserting their lien, must bring themselves within its terms, and the lien must be shown, not only to have been regular and valid in its inception, but to be a continuing and existing lien under the Statute."

This rule is followed in Cheney *v.* Troy Hospital Association (65 N. Y., 282), where the most stringent policy is favored, and the "highly remedial" character

of the Statute shown in Hubbell *v.* Schreyer, appears in the following language:

"There is nothing that requires, or in my opinion justifies, the enactment of laws conferring special protection to material-men, voluntarily furnishing materials to a contrator on credit, by incumbering the land of an owner who has entered into a contract with such contractor for the erection of a building on such land. Laws of that character seriously interfere with the alienation of such land, and create great difficulty and embarrassment in procuring loans, to be secured by a mortgage thereon. There is no reason why such a class of creditors should be entitled to the guardianship and aid of the State, by granting them a security for their debts, on the lands of another, against his will and in restraint of the free enjoyment thereof; and there is nothing in the act in question, which calls for or justifies the extension of its provisions beyond the cases clearly specified therein; and the construction claimed for it, on behalf of the respondents, is unwarranted thereby."

§ 264. The Rule in other States. Liberal Construction.—In a few States the liberal construction hinted at in Hubbell *v.* Schreyer, and followed by the Supreme Court in Chase *v.* James, (10 Hun., 517). is made the governing rule under Mechanics' Lien Statutes.

Thus in Alabama the Courts hold that while it is not permissible under the guise of interpretation to extend the provisions of the enactments to cases not provided for, it is equally unjust and unauthorized to emasculate the Statutes by a narrow or strict construction of their beneficial provisions. Their general policy is to secure

to the artisan and laborer the just reward of his labor, and the lien conferred is somewhat analogous in its aims to the equitable lien of the vendor, for unpaid purchase money of lands sold. It is inequitable, says the law, that one shall enjoy another's lands and not pay the promised price. So the policy of the lien law declares that it is inequitable that one shall enjoy another's goods, or the product of his labor and skill, without making just compensation therefor. The same reason which upholds the policy of the one, vindicates the justice of the other.*

In Colorado the same rule of construction prevails, on the ground that: "Laws giving the mechanic and material-man a lien on real property their labor or capital has contributed to improve and enhance in value, are founded in manifest equity. Such legislation is in behalf of a large and meritorious class, poorly able, as a rule, to sustain loss, and little qualified to rescue themselves against it by safeguards of their own suggestion. Notwithstanding the lien was unknown to the common law, and is purely a creature of the statute, in view of its equitable character we think the statute giving it should be liberally construed, so as to advance its objects."† The Supreme Court of Connecticut says: "The statute was made for the benefit of mechanics; and while the court properly insists that all the provisions of the statute shall be complied with, it does not insist upon technical nicety in the state-

* Ex parte Schmidt *v.* Smith, 61 Ala., 252. To the same effect see Geiger *v.* Hussey, 63 Id., 638; Welsh *v.* Porter, Id., 225.

† Barnard *v.* McKenzie, 4 Cal., 251; Westland *v.* Goodman, 46 Conn., 83.

ment of details, but will be satisfied with a substantial compliance." *

In Mississippi the courts hold that although a proper construction of a statute is based on the letters and words of the act, there still is ample room for the exercise of judicial discretion, which on all proper occasions should be exercised by Judges in a liberal spirit. Mechanics have always been favored by the Courts. This is just. They are often unlettered men, and Courts will uphold the policy of the country in giving the statutes in favor of mechanics and material-men a liberal construction ; nor should this be otherwise, and thus the just claim of a mechanic or material-man be baffled by any subterfuge ;† and the same rule is followed in other Southern States. Thus in Tennessee and Kentucky the wisdom of a fostering and liberal policy is recognized for the purposes of "The improvement of the country and the protection of unlettered men, dictating a free interpretation of all laws furthering the rights of mechanics."‡ With the exception of Ohio,§ New York ‖ Oregon and Connecticut, where the courts are divided, this rule of construction seems confined to a

* But see Consociated Pres. So. *v.* Staples, 23 Conn., 544 ; requiring a strict construction in the case of the statutory subrogation in favor of sub-contractors. See also Chapin *v.* Persse, 30 Id., 461, to the effect that a statute preventing the equal distribution of all the effects of a failing debtor among his creditors, as favored by the law, should be construed with reasonable strictness.

† Buck *v.* Brian, 2 How. (Miss.), 88; to the same effect see Buchanan *v.* Smith, 43 Miss., 90.

‡ Barnes *v.* Thompson, 2 Swan (Tenn.), 313; Brown *v.* Story's Administrators, 4 Met., (Ky.)

§ Thomas *v.* Huesman, 10 Ohio St., 152.

‖ See Chase *v.* James, 10 Hun, 506; Devlin *v.* Mack, 2 Daly, 94.

few of the Southern States and the border State of Missouri.*

§ 265. **Strictissima Juris.**—It cannot be doubted that the strict rule of construction has the most exponents. In Wagar *v.* Briscoe (38 Mich., 587), the Supreme Court of Michigan says: "In perfect agreement with the views generally maintained by the Courts of our sister States, this Court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property by permitting the institution of private charges on property without or against the owner's assent, and without any judicial or other official sanction, and by authorizing the enforcement of such charges by unusual and summary methods, and that the provisions of these enactments cannot be extended in their operation and effect beyond the plain and fair sense of the terms; and that the parties asserting liens or titles resting upon them must bring themselves and their titles plainly and distinctly within these terms, and affirmatively make out that a lien was originally effected regularly, and thereafter kept up, and that every essential statutory step either in the creation, continuance or enforcement of the lien has been duly taken. We have seen nothing to shake these opinions."

§ 266. In California the remedy is considered an "extraordinary one, to be strictly complied with:"† and although some of the reported cases use the term "substantial performance of the requirements of the statute,"‡ yet in their treatment of the cases arising under

* See Putnam *v.* Ross, 46 Mo., 337; Oster *v.* Rabenan, 46 Mo., 595.

† Davis *v.* Livingston, 29 Cal., 283; Bottomly *v.* Grace Church, 2 Cal., 91.

‡ Hooper *v.* Flood, 54 Cal., 218; Wood *v.* Wrede, 46 Cal., 637.

it they actually apply a very critical test. As for instance where the statute required that the amount should be stated in the notice of claim "over and above all payments and off-sets," a lien is held invalid if that clause does not appear *in hæc verba*.* This is farther than the latest decisions of the New York Common Pleas go under the Act of 1875, which was substantially copied from the California laws.†

In Illinois a similar rule prevails. In the case of Brady *v.* Anderson (24 Ill., 112), the Supreme Court says: "This lien is given by statute, is in derogation of the Common Law, is secret in its nature, no notice being required, by record or otherwise, either by creditors or purchasers, and it should, therefore, receive a strict construction. This lien, like all others of the same character, should be fairly enforced, when the party brings himself within the provisions of the statute, but it should not be extended to cases falling within the reason, but not provided for by the language of the statute." In Phillip *v.* Stone (25 Ill., 80), the same court say: "The law in question has received, at various times, the closest scrutiny of the court; and, whilst we admit it should have a liberal construction when applied to cases clearly within its provisions, we are forbidden to bring cases within it, which the legislature have not included. Should we do so, we would be justly chargeable with judicial legislation. It is far better to leave omitted cases to the future action of the same power that enacted the law. We can see no justice or propriety in extending a law, by liberal construction, which is partial in its operation, designed to benefit one class of

* Davis *v.* Livingston, 29 Cal., 283; Hooper *v.* Flood, 34 Id., 218.

† See Smith *v.* Bailey, 8 Daly, 128, and Fogarty *v.* Wick, Id., 156.

community over all others, and opposed to common right, so as to create mortgages and secret liens, in cases where the Legislature have not said they should exist."

Again, in the recent case of Belanger *v* Hersey (90 Ill., 70), the court held that the lien law must receive a strict construction, and no person can obtain a lien under it unless a clear compliance is shown with the requirements of the statute."*

This rule of construction prevails in Massachusetts, where the Supreme Court† in the last reported volume hold that the lien "can be preserved and enforced only by a strict compliance with the requirements of the statute. There are no equities to be invoked in aid of it." And in another late case the same tribunal remarks:

"The court is not authorized to extend the law beyond the causes specifically provided for. It cannot say that the statute by implication includes labor not within its terms. It cannot say that the labor performed is analogous to the labor for which a lien is given by statute; nor can it say that if the subject is brought to the attention of the Legislature, it would probably give a lien for such labor. It can only construe the language *as* enacted."‡ In New Jersey, the statute, although constitutional, and therefore enforceable within its letter, is held to be not of such a purely remedial character as to entitle it to a peculiarly liberal

* To the same effect see Rothberger *v.* Dupuy, 64 Ill., 452; Canisius *v.* Merrill, 65 Id., 67; Cook *v.* Heald, 21 Ill., 425.

† Gale *v.* Blaikee, 129 Mass., 206, 9 (July, 1880).

‡ Trask *v.* Searle, 121 Mass., 229. See also to the same effect Parker *v.* Anthony, 4 Gray, 289.

treatment by the courts.* "Under its terms, the man who has furnished a brick, a plank, or a stone, for the erection of the building, or who has labored a day for its construction, is secured his remuneration in full, while those who have furnished provisions for the owner or his family, who have supplied him with the necessaries of life, or who have toiled in their service, are deprived of all means of recompense until the favored creditors are satisfied. Such a discriminating statute deserves a strict construction."* The Courts of Pennsylvania are equally stringent in their rules of construction. "It has been felt," they say, "that the extraordinary remedy afforded by our laws to mechanics and material-men requires to be properly guarded to prohibit it from becoming a source of unjust annoyance and injury to those whose property is liable to be made the subject of the action. . . . As the law calls for nothing unreasonable at the hands of him who would fasten an encumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions."† "Indeed the great object of the statute in pointing out the characteristics of the statement to be filed would in the end be utterly defeated, were we to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate." ‡

* Ayres *v.* Revere, 1 Dutch. (N. J), 474 ; Associates of Jersey *v.* Davidson, 5 Id., 415.

† Reprer *v.* Zeigler, 3 Watts & Serg., 258 ; Thomas *v.* James, 7 Id., 831; Witman *v* Walker, 9 Id., 186.

‡ Wetmore's Appeal, 91 Pa. St., 276; Noll *v.* Swineford, 6 Id., 191; Elm *v.* Wren, 90 Id., 148; to the same affect see Kuhns *v.* Turney, 87 Id., 497; Loomis *v.* Fry, Id., 396; Dame's Appeal, 62 Penn., 417; Es-

CHARACTER OF STATUTE AFFECTS RULE OF CONSTRUCTION.

§ 267. **Character of Statute affects the Rule of Construction.**—These liens being of statutory origin, it very naturally follows, that, while a general policy pervades them all, great diversity of detail is found in the legislative systems of the different States. This diversity exists, alike, in the scope of the lien, the conditions of its creation, and the manner of its preservation and enforcement. Hence what will or will not uphold a lien under one system of statutes, is often a very poor guide in controversies arising under other legislation. Judicial precedents are usually serviceable in furnishing canons of interpretation and analogies to aid and direct judicial inquiry; but even this aid must be confined and superscribed by the limits of the statutes having similar features and provisions. Thus we find in those States where the law is so drawn as to work great oppression upon owners, *bona fide* purchasers and encumbrancers, the courts have a tendency to denounce the entire system of liens and hedge it about with the strictest rules of construction. While in other localities, where the lien does not affect third parties who acquire their rights prior to the filing of the notice, and where

terly's Appeal, 54 Id., 192; Schenley's Appeal, 70 Id., 98. For the same rule in other States, see Luter *v.* Cobb, 1 Cold., (Tenn.) 525; Jones *et al. v.* Alexander, 10 Smed. & Marsh, 627; Green *v.* Ely, 2 Greene (Iowa), 518; McCoy's Appeal, 1 Wright, 125; Farmers' Bank *v.* Winslow, 3 Minn., 86; Logan *et al. v.* Attix, 7 Iowa, 77; Greene & Bro. *v.* Ely, 2 Greene (Iowa), 208; Shropshire *et al. v.* Russell, 3 La. An., 962; Stevens *et al. v.* Sawyer *et al.*, 3 La. An., 429; Fisk *v.* Moore, 11 Robinson, (La.) 279; Grant *v.* Fiol, *et al.*, 17 La.. 162; Hoffman *v.* Laurans, *et al.*, 18 La., 73; Rochford *v.* Geraghty *et al.*, 10 La. An., 430; Hess *v.* Poultney, 10 Md., 268; Kerr *v.* Kerney, 5 Id., 419: Thomas *v.* Barber, 10 Id., 380; Greenough *v.* Nichols, 30 Vt. 768; Ferguson *v.* Ashbell, 53 Texas, 245; Shields *v.* Morrow, 51 Id., 393; Horan *v.* Frank, Id., 401.

in other respects the rights of the laborer or material-man are asserted with due regard to the interests of others; the courts declare the law to be highly remedial, and entitled to a very liberal construction. The local surroundings, the condition of affairs at the time of the passage of the law, as well as the character of the acts, often influence—and rightly too,—the rules governing the construction and effect of liens. Thus, in Alabama, Judge Stone, in the case of *ex parte* Schmidt,* says: "Our legislation for the last thirty years, and the overthrow of private fortunes consequent upon the late civil war, have had the effect to place much of the property of the country in fiduciary hands: and the beneficiaries of many estates, while they could and did enjoy the products of their property, were left without power to fasten a charge upon it by any contract of theirs. This, in many instances, worked great hardship, and inflicted grievous wrong; and our very liberal exemption statutes, in the absence of special waiver, have placed the entire property of much the larger portion of our population beyond the reach of legal process. The manifest and deplored result of all this has been that the honest toil of the laborer, and the merchandise of the material-man, have often been appropriated, by a faithlessness in some cases highly culpable. These considerations, no doubt, influenced the Legislature in declaring the very liberal and comprehensive system of liens now found upon our statute book." And these same considerations, no doubt, influenced the court in the very liberal construction of that same statute. On the other hand, in most of the Northern States, the statute gives a lien creditor preference over all sales

* 62 Ala. 252.

and encumbrances perfected after the commencement of the work, and before the filing of the notice. In such cases the statute falls under the just condemnation of upholding secret liens to the prejudice of creditors and *bona fide* purchasers, and receives a strict construction. In New York, where no such provisions prevail, the rules of construction founded thereon should be accepted with some caution.

§ 268. **Same as to general Creditors and bona fide Purchasers.**—The policy of the law favors an equal distribution of property among all the creditors of a failing debtor; hence, as to them, and also as to *bona fide* purchasers and encumbrancers taking without actual notice, the lien has usually been construed with reasonable strictness;* for however just its operations may be, between the owner and mechanics or material-men entitled to such a construction, at least between them, as not to defeat its beneficial purposes, care should be taken that it should not be extended beyond its legitimate scope, to the prejudice of third persons, who have no means of knowing of the existence of such encumbrances, save such as the statute points out.†

§ 269. **Strict Construction applicable to the right to acquire a Lien, and a liberal policy to the acquisition and enforcement thereof.**—Many judicial opinions, that seem to clash and conflict with each other on this point, may be harmonized on the basis of the rule suggested in the context to this section. Thus Massachusetts, one of the strongest believers in the strict construction policy, in the latest case on this sub-

* Ward *v.* Black, 7 Phila., 342; Wade *v.* Reitz, 18 Ind., 307.

† Farmers Bank *v.* Waislow, 3 Minn., 86; Luter *v.* Cobb, 1 Coldw., 525.

ject, holds that upon the question whether a lien attaches the most rigid rules must be applied; but that point being admitted, and the inchoate right of lien being beyond question, the provisions of the law upon the subject is remedial; and a liberal construction will be put upon the statute for the purpose of accomplishing its objects.* So in Kentucky, where the opposite general policy, that of liberality, is the rule, the courts hold that while the most liberal construction should be given the law for the protection of the mechanic, clearly embraced within its provisions, still as the class of persons included therein are allowed a security for their debts that is denied to others, the limitations and conditions upon which such rules depend must be carefully regarded. Again in Pennsylvania, where the strictest rules govern, a great departure is allowed in regard to mistakes of procedure in a case concededly within the statute. Although accuracy therein should be carefully attended to, yet, as claims are frequently filed by mechanics and material men themselves, to prevent manifest injustice, only such mistakes as are calculated to mislead others should destroy the claim, if there has been a substantial compliance. And for this purpose certainly, a substantial compliance is held to be all that can be reasonably required.† By glancing back at the quotations from those opinions favoring a strict construction, many exceptions will be noted in cases where the right of lien is clearly established, and the question only arises as to enforcement.

* Gale *v.* Blaikie, 129 Mass., 206, 9.

† Heckman *v.* Pinkney, 81 N. Y., 211, and see Burbridge *v.* Marcy, 54 How., 146.

STATUTES.

CHAPTER XVI.

CITIES' ACT OF 1880.

[Applicable to all the cities except Buffalo.]

LAWS OF 1880.—CHAP. 486.

AN ACT *to secure the payment of mechanics, laborers, and workmen who perform work, also persons furnishing materials toward the erection, altering or repairing buildings, wharves, vaults or any other structure in the cities of the State of New York.*

SECT. 1. **Persons doing Work, etc., to have Lien.**—Any person or persons who shall hereafter, either as contractor, sub-contractor, or in any capacity, under or in pursuance of, or in conformity with any contract, agreement or employment by the owner, lessee or person in possession of any land in any of the cities of the State of New York, perform any work, labor or services, or furnish any materials toward the erection, altering or repairing of any house, vault, wharf, fence or any other structure, or in grading, filling in, excavating or laying walks on any lots of land in the cities of the State of New York, shall, upon filing the notice prescribed in the second section of this Act, have a lien for the price or value of such work, labor, services and materials upon such house, vault, wharf, fence, or other structure,

and appurtenances, and the lot upon which said grading or excavating is done, or walk laid, to the extent of the right, title and interest of the said owner, lessee or person in possession of said house, vault, wharf, fence or other structure and appurtenances, and the land upon which the same stand, at the time of the filing of the notice of claim in the second section of this act specified, or the successors in interest of such owner, lessee or person so in possession taking with notice of said lien.

§ 2. When notice to be Filed, and what to Contain.—At any time before or within thirty days after the completion of the erection, altering or repairing of any house, vault, wharf, fence or structure, or grading, filling in, excavating, or laying walks on any lot of land in the said cities of the State of New York, the persons so performing such work, labor or services, or furnishing such materials, may file with the clerk of the county where the land or premises are situated, a notice in writing stating his or their residences, the amount of the claim, from whom due, and if not due, when it will be due, the person or persons against whom the claim is made, the name of the owner, lessee, or person in possession of the building (against whose interest a lien is claimed), but the failure to state the name of the true owner, lessee or person in possession shall not impair the validity of the lien ; also a brief description of the buildings or premises sufficient to identify the lands or premises against which the lien is claimed. The said notice of lien shall be verified by the person or persons making the claim, or his or their agent, or any other person, to the effect that the statements therein contained are true, to the best of his or their knowledge, information and belief. Successive liens may be filed for work,

labor, services and materials done and furnished, under one contract or employment, but the filing of any such lien or liens shall not entitle the person so filing the same to recover judgment for the amount of such lien or liens unless he shall be entitled to receive payment by the terms of the contract, or agreement, or employment, and in case of sub-contractors or persons doing work or furnishing materials to contractors, no judgment shall be rendered for any greater amount than the amount which shall be due from the owner to the contractor at the time of the filing of the lien, or which may become due afterward, or which by the terms of the contract or agreement shall be due at the time of the rendering of such judgment.

§ 3. **Priority of Liens.**—Where an owner of land contracts with a builder for the sale of lots and the erection of buildings thereon, and agrees to advance moneys toward the erection of such buildings, the lien hereinbefore authorized shall have priority to all advances made after the filing of said notices of lien. And the lien shall attach to the right, title and interest of the owner in said building and land to the extent of all advances which shall have become due after the filing of such lien, and shall also attach to and be a lien on the right, title and interest of the person so agreeing to purchase said land at the time of the filing of said notices of lien.

§ 4. **Lien Docket.**—The county clerk shall enter in a lien docket the name and residence of the claimant, the person against whom claimed, the amount claimed, the date of filing, and a brief description of the premises affected. He shall be entitled to receive a fee of ten cents for each lien filed.

§ 5. **When Liens to Cease.**—Liens shall in all cases cease after one year from date of filing unless an action shall be commenced, and a notice of *lis pendens* filed with the clerk of the county wherein the premises are situated, or an order made continuing the lien for another year; in the latter case the county clerk shall, upon filing such order, make a new docket of such lien. Successive orders and new dockets may be made in the discretion of the court.

§ 6. **Discharge of Liens.**—The lien may be discharged as follows:

1. By filing a certificate of the claimant or his successor in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is discharged.

2. By depositing with the county clerk, if before suit is commenced, a sum of money equal to the amount claimed; and if suit shall have been commenced, a sum equal to the amount claimed; and such sum in addition as shall be ordered by a judge of the court in which the action shall have been commenced, as security for the costs of the action; such deposit, after suit brought, to be made on notice or on an order to show cause directed to the plaintiff in the action or his attorney.

3. By the expiration of one year after the filing of said lien without any order being made continuing the same or notice of *lis pendens* filed as aforesaid.

§ 7. **Foreclose Liens.**—The liens provided under this act shall be enforced by civil action commenced in any court of record in said city, having equitable jurisdiction, by any persons claimant, the original or subcontractor, or an assignee thereof, or contractor against

any property affected thereby, at any time within one year from the filing of such lien. Such action shall be commenced, carried on and judgment entered and enforced as provided in an action to foreclose a mortgage in the Code of Civil Procedure, and the plaintiff shall make all other parties who have filed subsequent liens under this act, or have any prior record, claims or liens upon said premises and their appurtenances, defendants in such action. And the Court shall determine the priority of the liens, the amounts due thereon, and the rights of the respective parties, and render judgment accordingly. The Court may also render personal judgment against or in favor of any party to the action. Costs for or against the parties litigant shall be in the discretion of the court.

§ 8. **Consolidation of Actions.**—When separate actions are brought to foreclose liens against the same property, the Court may, on motion, consolidate them.

§ 9. **Appeals.**—Appeals in actions to enforce liens, provided for in this act, governed by the same rules, may be taken in the same manner and within the time, and shall be governed by the same rules and practice as prevail in actions for the foreclosure of mortgages.

§ 10. **Public Buildings Exempt.**—Buildings and property used for public purposes are especially excepted from the operation or effect of this act.

§ 11. This act shall not apply to the city of Buffalo.

§ 12. This act shall take effect immediately.

BUFFALO CITY ACT OF 1880.

LAWS OF 1880.—CHAP. 143.

AN ACT *for the better security of mechanics, laborers and others who perform labor or furnish materials for buildings and other improvements on land in the City of Buffalo.*

§ 1. **Persons Entitled to a Lien.**—Any person who shall hereafter perform any labor or furnish any materials which have been used, or are to be used, in building, altering or repairing any house, building or other improvement upon lands or appurtenances to such house or building, by virtue of any contract with the owner thereof, or his agent, or with any contractor or sub-contractor, or any other person contracting with the owner of such lands to build, repair, alter or improve, as aforesaid, within the City of Buffalo, shall, upon filing the claim prescribed in the fifth section of this act, have a lien for the value of such labor and materials upon such house, building and appurtenances and upon the lot of land upon which the same stand, to the extent of the right, title and interest at that time existing, of such owner, in the manner and to the extent hereinafter provided; but such owner shall not be obliged to pay for or on account of such house, other building or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract, except in the case provided in the third section of this act, nor

shall the liens in the aggregate exceed the amount which the owner would be otherwise liable to pay at the time of the filing of the claims prescribed by section five of this act.

§ 2. Notice to the Owner.—Any person, persons or firms furnishing any materials which have been used or which are to be used in building, altering or repairing any house or other building, or appurtenance to any building, in the city of Buffalo, pursuant to any contract, express or implied, with any person other than the owner, and any person, persons or firms, who have performed or are performing or rendering any service or labor in erecting, altering or repairing any house or other building, or appurtenance to any building, in the city of Buffalo, pursuant to any contract, express or implied, with any person other than the owner, may give the owner thereof, if in said city of Buffalo, or if absent therefrom, his authorized agent or attorney, notice that such materials have been furnished or are being furnished, or are thereafter to be furnished pursuant to any such contract, express or implied, or that such service or labor has been performed, or is being performed pursuant to any such express or implied contract, or is thereafter to be performed, and such owner shall retain from the amount due or unpaid the contractor of said house, building or appurtenance, if erected, altered or repaired, by contract, or from the person or persons entitled to compensation therefor from such owner, if the same is not done by contract, sufficient to pay for such materials, service or labor, provided there remains unpaid a sufficient amount for that purpose.

§ 3. Effect of the Notice.—If after the giving of

such notice the said owner of such house or other building shall, by collusion or otherwise, pay either to the contractor, or the persons entitled by the terms of the contract to receive compensation from such owner for erecting, altering or repairing as aforesaid, and there shall not remain unpaid sufficient to pay for such materials or service or labor, and said contractor, or person entitled, by the terms of the contract, to receive compensation from such owner for such erecting, altering or repairing, or for such service or labor, then said owner shall be liable to the amount that would have been due had no payments been made after the giving of such notice; and the person, persons or firms furnishing such materials or rendering such service or labor may, by filing claim and serving notice thereof within the time provided in the fifth section of this act, of the service or labor done or performed, and of the materials furnished or to be furnished in erecting, altering or repairing such house or other building, stating the price thereof, such claim to be filed and notice thereof to be served in the manner provided in the fifth section of this act; and the person, persons or firms so filing said claims and serving said notice shall have a lien upon such house or other building and appurtenances and the lot of land upon which the same stands, for the value of such services or labor or materials to the amount that would have been unpaid had said owner made no payments either to said contractor or person entitled by the terms of the contract to receive compensation from such owner for furnishing such materials, or performing or rendering such labor or service, after giving of the notice provided for in the second section of this act.

§ 4. **Owner must furnish Terms of Contract.** — Any person, persons or firms furnishing materials or rendering or performing service or labor in erecting, altering or repairing any house or other building or appurtenance, to or for any person other than the owner thereof, may, at the time of giving such notice as in this act provided, demand of the owner of such house or other building, or of his authorized agent, the terms of the contract or agreement by which or under which said house or other building or appurtenance is being erected, altered or repaired, and the amount due or unpaid the person, persons or firms erecting, altering or repairing the same; and if such owner or his said agent, at the time of said demand, shall neglect or refuse to inform the person making such demand of the terms of the contract or agreement upon which said house or other building or appurtenance is being erected, altered or repaired, and the amount due or unpaid upon such contract or agreement therefor, or shall, intentionally and knowingly, falsely state the terms of said contract or agreement, or the amount due or unpaid thereon; and if the person, persons or firms furnishing such materials or rendering or performing such service or labor shall sustain loss by reason of such refusal or neglect or false statement, the said owner shall be liable to them in an action therefor, and the return of an execution unsatisfied against the party to whom such materials were furnished, or for whom such labor and service was performed, in an action for the collection of the value thereof, shall be sufficient proof of such loss; or the person, persons or firms furnishing such materials or rendering or performing such service or labor shall, by filing claim

within the time by this act provided, and serving the notice thereof as in this act provided, have a lien upon such house or other building and appurtenances, and the lot of land upon which the same stands, as in this act provided, for all the materials furnished, or labor, or service rendered or performed after such neglect, refusal or false statement.

§ 5. Perfecting the Liens.—Every original contractor within four months after the completion of his contract, and any person, persons or firms, save the original contractor claiming the benefit of this act, must within sixty days after the performance of the work, or the furnishing the materials for which the lien is claimed, file with the county clerk of Erie county a claim containing the names and residence of the claimants, the nature and amount of the work performed, or the materials furnished or to be furnished, with the name of the owner or reputed owner, if known, the name of the person by whom he was employed, or to whom he furnished, or is about to furnish, such materials, with a statement of the terms, time given, and conditions of his contract, and whether all the work for which the claim is made has been actually performed or furnished, and if not, how much of it, and also a description of the property to be charged with a lien sufficient for identification, which claim must be verified by the oath of himself or one of several united in interest, or of some other person. The verification must be to the effect that the statements contained in the claim are true to the knowledge of the person making the same. If his or their contract, or any part thereof, be in writing, a copy of such writing must be filed with and made a part of his or their claim. Every

person other than the original contractor shall, within ten days after filing his claim, as herein provided, serve a copy of such claim upon said owner by delivering the same to him personally, or if he be absent from said city or cannot be found therein, then by serving such copy upon his authorized agent or attorney, but if said owner have no authorized agent or attorney, then by serving such copy upon the person in the possession of the premises against which such claim is made.

§ 6. "Lien Docket."—The clerk of the County of Erie shall provide and keep a book which shall be called the "Lien Docket," in which he shall enter alphabetically, the names of the owners, and opposite to them the names of the claimants and a description of the premises against which the claim is filed, sufficient for identification, and the time of filing such claim. And the said Clerk shall in each case receive the sum of twenty cents.

§ 7. Lien Priorities. — The liens provided for in this Act shall be preferred to any conveyance, judgment, mortgage or other incumbrance of which the lien-holder had no notice, and which was not docketed or recorded at the time of the filing of the claim referred to in the fifth section of this Act. In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner, within the intent and meaning of this Act, until a deed shall have been actually delivered conveying said premises in fee simple, pursuant to such agreement.

§ 8. Limitation of Liens. — No lien provided for in this Act shall bind the property therein described for a longer period than one year after the claim has been

filed, unless within that time an action be commenced to enforce the same, and a notice of the pendency of such action be filed with the County Clerk of the County of Erie, containing the names of the parties, the object of the action, the description of the premises affected thereby, and the time of filing the claim. And when a claimant is made a party defendant to any action brought to enforce any other lien, such action shall be deemed an action to enforce the lien of such defendant, who is a claimant within the provisions of this section. But the neglect to file such notice shall not abate any action which may be pending to enforce the lien, and such action may be prosecuted to judgment against the persons personally liable for the debt.

§ 9. **Enforcement of Claim by Action.** — Any claimant who has filed the claim mentioned in the fifth section of this Act may enforce his claim against the property therein mentioned and against the person liable for the debt, by a civil action in a court of record held in said city.

§ 10. **Form of Action.**—The manner and form of instituting and prosecuting any such action to judgment, and any appeal from such judgment, shall be the same as in actions for the foreclosure of mortgages upon real property, except as herein otherwise provided.

§ 11. **Parties to the Action.**—The person filing the claim, or the assignee of such person, shall be the plaintiff in such action. The plaintiff must make all parties who have filed claims against the property, as well as those who have subsequent liens or claims by judgment, mortgage or conveyance, parties defendant. And as to all persons against whom no personal claim is made, the plaintiff may, with the summons, serve a

notice stating briefly the object of the action, and that no personal claim is made against them. But all persons who have filed claims under this Act may, by answer in such action, set forth the same, and the court in which the action is brought may settle and determine the equities of all the parties thereto, and decide as to the extent, justice and priority of the claims of all parties to the action, and upon every counter-claim and set-off alleged therein.

§ 12. **Claimants may join in same Action.**—Any number of persons claiming liens upon the same property may join in the same action, and when separate actions are commenced, the court in which the first was brought may, on the application of the owner of the property, or of any part thereof, or of any party to either action, consolidate them.

§ 13. **Payment into Court.**—At any time after the action is commenced, the owner of the property affected may, in writing, offer to pay into Court any amount stated in the offer, or to execute or deliver any securities or papers which he may describe in discharge of the property. If the offer is accepted in writing within ten days thereafter, the Court in which the action is pending may make an order, that on deposit with the clerk of the Court of the amount offered, or the securities or papers described, the lien be discharged, and the money or securities deposited, thereafter take the place of the property upon which such lien was created, and shall be subject to the same. In case the offer shall not be accepted within ten days and the plaintiff fails to recover any more favorable judgment against the property, he shall pay all costs in the action incurred by the owner from the time of the offer.

§ 14 **Sub-contractor's Priorities, etc.**—All persons entitled to liens on the house, building or improvement, except those who contracted with the owner thereof, shall be deemed sub-contractors; and the Court in the judgment shall direct the amount due sub-contractors to be paid out of the proceeds of sales before any part of such proceeds are paid to the contractor. In case of several buildings erected, altered or repaired under one contract and of conflicting liens, each shall have priority on the particular building where his labor is performed or his material used. Persons standing in equal degree as co-laborers, or various persons furnishing materials, shall have priority according to the date of filing their liens. Where several lien notices are filed for the same demand, as in case of a contractor including claims for workmen to whom he is indebted, and a lien by the workmen, the judgment shall provide for the proper payments, so that under the liens filed double payment shall not be required; but no payments voluntarily made upon any claim which has been filed as a lien shall impair the lien of any person except the lien of the person so paid.

§ 15. **Courts to declare rank of Lien.**—In every case in which different liens are asserted against property, the Court in the judgment must declare the rank of each lien or class of liens, and the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank.

§ 16. **Payment by Specific Property.**—Whenever, by the terms of his contract, the owner has stipulated for the delivery of bills, notes, or other obligations or securities, or of any other species of property, in lieu of money, the judgment must direct that such substitute

be delivered or deposited as the Court may direct, and the property affected by the liens can only be directed to be sold in default of the owner to deliver such substitutes within such time as may be directed.

§. 17. Judgment for Deficiency.—Whenever, on the sale of property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency against the persons named in the judgment as personally liable therefor, and therein adjudged to pay the same in like manner and with like effect as in actions for the foreclosure of mortgages.

§ 18. Lien, how Discharged.—The lien may be discharged as follows:

1. By filing a certificate of the claimant or his successor in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is satisfied and may be discharged.

2. By the deposit with the clerk, if before the suit, of a sum of money equal to the amount claimed, with interest to the time of such deposit.

3. After the commencement of an action, by the deposit with the clerk of the Court, of such sum as in the judgment of the Court, after due notice to all claimants, parties to the action, will be sufficient to pay any judgment which may be recovered against the property.

4. In lieu of such deposit, as prescribed in the last preceding sub-division of this section, the Court may require the execution and delivery to the clerk of the Court of a bond, in such penalty as the Court may direct, executed by two sufficient sureties, conditioned for the payment of any judgment which may be rendered against the property in the action. The sureties

must justify in at least double the penalty named in the bond. A copy of the bond, with a notice that the sureties will attend and justify before the court or a justice thereof, at a time and place therein named, not less than five days thereafter, must be served on the claimant or his attorney. Upon the approval of such bond, the court may make an order discharging the lien.

5. By lapse of time, when one year has elapsed from the time of filing the claim, and no action has been commenced to enforce such claim as provided in section eight of this act.

6. By order of the Court, for neglect of the claimant to prosecute the same, the owner of the property, or of any part thereof affected by any claim filed under this Act, or the person against whom the claim is made, may, at any time after filing of any claim, serve a notice in writing upon the claimant, or upon any one of the several united in interest, requiring such claimant to commence an action to enforce the claim within a time to be specified in the notice, but not less than ten days from the time of such service, or to show cause at a special term of any court of record in said city, at a time to be specified in such notice, why the claim so filed should not be vacated and canceled of record. Thereupon, upon due proof of the service of such notice that no action has been commenced to enforce the claim, the Court may make an order that the claim be vacated and canceled of record. And it shall not be lawful to file a claim for the same cause against the same property or any part thereof.

19. **Costs.** Costs in all actions under this Act, except as provided in section thirteen, shall be allowed upon the

same principles and by the same rules as they are, or may be allowed by statute in civil actions in courts of record, and shall form a part of the judgment, but in cases where the amount of the recovery is less than fifty dollars, no more costs than damages shall be allowed the party recovering such judgment, and such costs, exclusive of disbursements, shall not exceed twenty dollars.

§ 20. General Provisions. This Act shall apply to the City of Buffalo only.

§ 21. The following acts and parts of acts, so far as the same relate to the City of Buffalo, heretofore passed by the Legislature of the State, are hereby repealed, namely:

1. Of the Laws of eighteen hundred and forty-four, chapter three hundred and five.

2. Of the Laws of eighteen hundred and fifty-one, chapter five hundred and seventeen.

3. Of the Laws of eighteen hundred and seventy-one, chapter eight hundred and seventy-two.

But this Act shall not be so construed as to affect, enlarge, invalidate or defeat any lien or right of lien now existing or any proceeding to enforce such lien now pending by virtue of any of the provisions of the Acts hereby repealed.

§ 22. This Act shall take effect immediately, except that the provisions of this Act relating to the fees to be paid to the County Clerk of Erie County, for entering and filing the claim, as provided in this Act, shall not take effect until January first, eighteen hundred and eighty-three.

STATE ACT OF 1873.

LAWS OF 1873.—CHAP. 489.

AN ACT *to amend an act entitled "An Act for the better security of Mechanics and others, erecting Buildings in the Counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess, passed April seventeenth, eighteen hundred and fifty-four," and as amended by Chapter 558 of the Laws of* 1869, *entitled "An Act for the better security of Mechanics and others erecting Buildings in either of the counties of this State, except the Counties of Erie, Kings, Queens, New York and Onondaga."*

Passed May 12, 1873; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. Section one of the act entitled "An Act for the better security of Mechanics and others erecting Buildings in the Counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess, passed April seventeenth, eighteen hundred and fifty-four," and as amended by Chapter 558, of the Laws

of 1869, entitled, "An Act for the better security of Mechanics and others erecting Buildings in either of the counties of this State, except the Counties of Erie, Kings, Queens, New York, and Onondaga," is hereby amended so as to read as follows:

§ 1. Any person who shall hereafter perform any labor in erecting, altering, or repairing any house, building, or the appurtenances to any house or building in either of the counties of this State, except the Counties of Erie, Kings, Queens, New York, Onondaga, and Rensselaer, or who shall furnish any materials therefor, with the consent of the owner, being such owner as is in this Section hereinafter described, shall, on filing with the County Clerk of the county in which the property is situate the notice prescribed by the fourth Section of this act, have a lien for the value of such labor and materials upon such house, building, or appurtenances, and upon the lot, premises, parcel, or farm of land upon which the same shall stand, to the extent of the right, title, and interest of the owner of the property, whether owner in fee or of a less estate, or whether a lessee for a term of years thereafter, or vendee in possession under a contract existing at the time of the filing of said notice, or any right, title, and interest in real estate against which an execution at law may now be issued under the general provisions of the statutes in force in this State, relating to liens of judgment and enforcement thereof.

§ 2. Section two of said act is hereby amended so as to read as follows:

§ 2. Whenever the labor performed or materials furnished shall be upon the credit of any contractor

who shall have made a contract therefor with the owner of the property, or such person interested as aforesaid, whether such contract be oral or in writing, express or implied, or for any specified sum or otherwise, or upon the credit of any sub-contract, or the assignee of any contractor, the provisions of this act shall not oblige the owner of the property or other person in interest as aforesaid to pay for or on account of any labor performed or materials furnished for such house, building, or appurtenances any greater sum or amount than the price so stipulated and agreed to be paid therefor by said contract, or the value of such labor and materials, except as in the next Section provided.

§ 3. Section three of said act is hereby amended to read as follows:

§ 3. If the owner, or such person in interest as aforesaid, of any building for or toward the construction, altering, or repairing of which, or its appurtenances, labor, or materials shall have been furnished by contract, whether oral or written, shall pay to any person any money or other valuable thing on such contract, by collusion, for the purpose of avoiding or with intent to avoid the provisions of this act, when the amount still due or to grow due to the contractor, sub-contractor, or assignee, after such payment has been made, shall be insufficient to satisfy the demands made in conformity with the provisions of this act, the owner or other party in interest, as aforesaid, shall be liable to the amount that would have been due and owing to said contractor, sub-contractor or assignee, at the time of the filing of the notice in the first Section

of this act mentioned, in the same manner as if no such payment had been made.

§ 4. Section four of said act is hereby amended to read as follows:

§ 4. Within sixty days after the performance and completion of such labor, or the final furnishing of such materials, the contractor, sub-contractor, laborer, or person furnishing the same, shall file a notice in writing in the Clerk's office in the county where the property is located, specifying the amount of the claim and the person against whom the claim is made, the name of the owner, or the party in interest, as aforesaid, of the premises, and if in a city or village, the situation of the building by street and number, if the street or number be known. The County Clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "Lien Docket," which shall be suitably ruled in columns headed "claimants," "against whom claimed," "owners and parties in interest," "buildings," "amount claimed," and the date of the filing of the notice, hour and minute, what proceedings have been had. The names of the owners and parties in interest and other persons against whom the claims are made shall be entered in said book in alphabetical order. A fee of ten cents shall be paid to said Clerk on filing such lien, and no lien shall attach to said land, buildings, or appurtenances unless such notice shall be filed by said Clerk; and such notice, when so filed, shall thereafter operate as an incumbrance upon said property.

§ 5. Section five of said act is hereby amended to read as follows:

"STATE ACT" AS AMENDED IN 1873.

§ 5. Any person performing labor, or furnishing materials, in availing himself of the provisions of this act, shall, upon the trial, or at the assessment of damages, produce evidence to establish the value of such labor or materials; and that the same was performed for or used by the said owner or party in interest as aforesaid, or his agent, originally contractor, sub-contractor or assignee of such contractor, in or toward the construction, altering or repairing of such house, building or appurtenances.

§ 6. Section six of said act is hereby amended to read as follows:

§ 6. Any contractor, sub-contractor, mechanic, laborer or other person performing any work or furnishing any materials as above provided, or the assignee of any such person or persons, may, after such labor has been performed or materials furnished, and filing of the notice required by the fourth Section of this act, bring an action in the Supreme Court in the county in which the property is situate, or in the County Court of said county when the amount exceeds fifty dollars, to enforce such lien, which action shall be commenced by serving a notice containing a statement of the facts constituting the claim and the amount thereof, and any other facts material to the case, on the owner of the property, or such party in interest as aforesaid, or his agent, as well as upon each and every claimant by whom notice of lien shall have been previously filed, as well as upon any contractor, sub-contractor or other person having an interest in the subject-matter of said claim, requiring such person or persons to appear in person or by attorney within twenty

days after such service and answer the same, and serve a copy of such answer, together with a notice of any set-off or claim that he or they may have, upon the claimant or his attorney, or in default thereof, that the claimant will take judgment against said owner or other person in interest as aforesaid, for the amount claimed to be due for the labor performed or materials furnished with interest thereon and costs, and the enforcement of said lien; said Supreme Court and County Court shall have full power to adjust and enforce all the rights and equities between all or any of said parties, and enforce or protect the same by any of the remedies usual in said courts.

§ 7. Section seven of said act is hereby amended so as to read as follows:

§ 7. Within twenty days after the service of said notice and a bill of particulars, as hereinafter provided, the defendant or defendants named therein shall personally serve the claimant, or his attorney, with a copy of his or their answer or answers, and notice of set-off, or counter-claim, if any, duly verified by oath, to the effect that the same is in all respects true, or his or their default may be entered and judgment taken and enforced as hereinafter provided.

§ 8. Section eight of said act is hereby amended so as to read as follows:

§ 8. When the amount of the lien claimed is two hundred dollars or under, the claimant may commence his action, in a Justice's Court of the town or city in which the premises are located, by serving a notice upon the owner or party in interest as aforesaid, or his or their agent anywhere within this State, requiring

him or them to appear before a justice of the town or city in which such premises are located, which notice shall contain a statement of the facts constituting the claim and the amount thereof, and shall require him or them to appear before said Justice in person, or by attorney, at a time certain, not less than twenty days after such service, and answer the same, or in default thereof that the claimant will take judgment against such owner or party in interest for the amount so claimed to be due, with interest thereon, and costs.

§ 9. Section nine of said act is hereby amended to read as follows:

§ 9. In any case where a notice hereinbefore mentioned cannot be served personally on such owner or party in interest, or his or their agent, by reason of absence from the State, or being concealed therein, then such service may be made by leaving a copy of such notice at the last place of residence of such owner or party in interest, and publishing a copy thereof for three weeks in succession, in a newspaper published in the city or county where the property is located; and in case of the service of such notice by publication, then the said twenty days shall commence to run from the date of the first publication of said notice.

§ 10. Section ten of said act is hereby amended to read as follows:

§ 10. At the time of the service of said notice as hereinbefore directed, a bill of particulars of the amount claimed to be due from such owners or party in interest, his or their contractor or sub-contractor, verified

by the oath of the claimant or his attorney to the effect that the same is true, shall be served as aforesaid upon such owner or party in interest, or his or their agent, and all other persons made parties (if any), except that such bill of particulars need not be published with such notice.

§ 11. Section eleven of said act is hereby amended to read as follows:

§ 11. In case said owner or other party in interest, or the person or persons upon whom such notice shall have been served, as mentioned in Section six of this act, shall not appear as required in and by the notice given in pursuance of the sixth and eighth Sections of this act, then, on filing with the County Clerk, when such action is brought in the Supreme Court or County Court, or with the Justice, when the action is before said justice, an affidavit of the service of such notice and bill of particulars, and the failure of the owner or other party in interest, and such person or persons as aforesaid, to appear as therein required, the amount of such claim may be assessed by said County Clerk, or by the court or Justice as the case may be; and upon the assessment of damages as aforesaid, judgment shall be entered upon the said assessment, establishing the amount of said lien, with the costs; execution shall thereupon issue for the enforcement and collection of said claim so adjudicated and established, in the same manner as executions upon other judgments in said courts in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner or other person in interest had in the premises

at the time of filing the notice prescribed by the first Section of this act.

§ 12. Section twelve of said act is hereby amended to read as follows:

§ 12. On the appearance of both parties before the Justice, where an action is brought before a Justice of the Peace, the owner or other party in interest as aforesaid shall put in an answer in writing duly verified with a bill of particulars, or counter-claim or set-off (if any) annexed, and the issue formed by the service of the notice and bill of particulars on the part of the claimant, and the answer and bill of particulars on the part of the owner or other party in interest, shall be tried and governed by the same rules as other issues in Justices' courts; and the judgment thereon shall be enforced, if for the claimant as hereby provided, and if for the owner or other party in interest, as in other actions arising on contract.

§ 13. Section thirteen of said act is hereby amended to read as follows:

§ 13. When the action is brought in the Supreme Court or in the County Court, the issue shall be formed by the service of the notice and the bill of particulars on the part of the claimant as before directed; and the answer with a bill of particulars, set-off or counter-claim of the owner or other party in interest, or of any other person who has been made defendant as hereinbefore provided, duly verified.

§ 14. Section fourteen of said act is hereby amended to read as follows:

§ 14. At any time after the issue shall be so joined in the Supreme Court or County Court, and at least

fourteen days before the commencement of the court, the same may be noticed for trial and put upon the calendar of said courts by either party furnishing the Clerk of the court with a note of issue as now required in other actions; and the action thereafter shall be gov erned and tried in all respects as upon issues joined and judgment rendered in other actions for relief arising on money demands upon contracts in said courts; and judg ment thereupon shall be enforced if for the claimant, as provided by this act, and if for the owner or person or persons in interest, as in other actions arising on contract.

§ 15. When such action is brought in the Supreme Court or in the County Court, such court shall have power to ascertain and declare the interests of the several claimants, if more than one, in the moneys due or to grow due from the owner or other person or persons interested in said premises, as aforesaid, and the priority and amounts of the respective liens, as well as to adjudge or decree the particular person or persons entitled thereto, and to declare the interests of all parties who have been made parties to the proceedings, and to conclude the whole controversy in one final decision, and for that purpose to render judgment or make such order or decree in favor of or against any one or more of the parties severally or jointly as may be just, leaving the action to proceed against the other party or parties, and may order separate trials between any of the parties in its discretion.

§ 16. When a judgment has been rendered by any Justice in favor of a claimant, such Justice shall give a transcript thereof, which may be filed and docketed

in the office of the Clerk of the county where the judgment was rendered. Such transcript shall contain the full name or names of the party or parties, in whose favor or against whom such judgment shall be rendered, and their relation as claimant or owner, debtor or creditor, a specific description of the premises affected thereby, the amount for which such judgment is rendered, together with the costs incident thereto. The time of receipt of such transcript by the County Clerk shall be noted thereon, and entered on a docket, and thereupon such judgment shall become a judgment of the County Court and enforceable in all respects as provided by Section eleven of this act.

§ 17. All or any of the issues in such action (if brought in the Supreme Court or a County Court), or for the purpose of taking proofs therein, may be referred by the written consent of the parties, or where the parties do not consent, the court may, upon the application of any party to such action, direct a reference thereof, in the same manner and to the same effect, in all respects, as specified in Section two hundred and seventy-one of the Code of Procedure, and such referee or referees shall have all the powers conferred upon referees by Sections two hundred and seventy-two and two hundred and seventy-three of said Code.

§ 18. Section sixteen of said act is hereby amended to read as follows :

§ 16. Costs and disbursements shall be allowed to either party upon the principles and by the same rules in such actions as are now allowed by law in actions for relief arising on contract, and shall be included in the judgment recovered therein, and the expenses in-

curred in serving said notice by publication, may be in Justices' Courts, and added to the amount of costs now allowed in said courts. When the action is brought in the Supreme Court or in a County Court, such direction shall be made in the discretion of the court, as to the payment of costs, as shall be just and equitable, and the judgment entered shall specify as to whom and by whom the costs are to be paid.

§ 19. Section seventeen of said act is hereby amended so as to read as follows:

§ 17. A transcript of every judgment rendered under this act, headed "Lien Docket," shall be furnished by the Clerk of the county where rendered and docketed to the successful party, who may file the same with the County Clerk of any other county, and the same shall thereafter be a lien on the real property, in the county where the same is filed and docketed, of every person against whom the same is rendered, if, for twenty-five dollars or upward, exclusive of costs, in like manner and to the same extent as in other actions for the recovery of money arising on contracts, and where the judgment is against the claims, the County Clerk shall enter the word "discharged" under the last head in his lien-docket, on receiving a transcript from the County Clerk or Justice that judgment has been rendered against the claimant.

§ 20. Section eighteen of said act is hereby amended so as to read as follows:

§ 18. In case the owner or his agent, or other parties in interest, shall desire to secure proofs of and from persons having claims under the provisions of this act, he may at any time give personal notice to such person

or persons, or if, by reason of absence from the State, or being concealed therein, such personal service cannot be made, then such owner or party interested in such property as aforesaid, or his or their agent, may, at any time, give public notice in the same manner as notice is required to be given for sale of real estate by virtue of an execution, to all persons having claims under any of the provisions of this act against such buildings, lands, premises or appurtenances, at the time of the date of publishing such notice, to present the same, with vouchers in support thereof, to any Justice of the Peace in the city, town or village where such premises are situated, on or before a certain hour or day to be specified in said notice, and to be at least six weeks from the service or the first publication of said notice; and in case of the failure of such person or persons to present his or their claims as required by said notice, each and every person so failing shall forever lose the benefit and be precluded of the said lien.

§ 21. Section nineteen of said act is hereby amended to read as follows:

§ 19. Whenever such owner or party in interest as aforesaid, or his or their agent, shall be proceeded against by a mechanic, contractor or sub-contractor, or any other person claiming under the provisions of this act, it shall be lawful for such owner or person in interest, or his or their agent, to give the notice prescribed by the preceding Section for the presentation of claims to the court or Justice before whom the proceedings all commenced, and present as a set-off, all claims and liens thereupon presented or established, and the Justice before whom or a Judge of the court in which the pro-

ceedings shall be commenced, may, upon the request of the owner or his agent, or such person interested in the premises as aforesaid, grant a stay of proceedings, sufficient to enable such notice to be given, and call in all such claims, which said claims, if established and allowed by the Justice or the court, shall be adjusted and may be a set-off to such contractor's claim to the amount so allowed, or otherwise, as shall be just, according to priority, and the court may determine and enforce any of the claims so presented, and render judgment thereupon.

§ 22. Section twenty of said act is hereby amended to read as follows:

§ 20. Every lien created under the provisions of this act shall continue until the expiration of one year, unless sooner discharged by the court, or some legal act of the claimant in the proceedings, but if, within such year, proceedings are commenced under this act to enforce or foreclose such lien, then such lien shall continue until judgment is rendered thereon, and for one year thereafter; such lien shall also continue during the pendency of an appeal, and for one year after the determination thereof. When a judgment is rendered as aforesaid, it may be docketed in any county of this State and enforced as if obtained in an action in a Court of Record.

§ 23. Section twenty-one of said act is hereby amended so as to read as follows:

§ 21. After a judgment shall have been rendered in pursuance of the provisions of this act, either party may appeal therefrom in the same manner, and within the time appeals may now be taken in actions for the

recovery of money arising on contract, and said appeal shall be thereafter heard, governed and determined upon the same principles and by the rules that appeals in said actions are now heard, governed and determined, with like costs and disbursements, and the judgment thereon enforced in the same manner as judgments on appeal are now enforced and collected. Such appeal shall be had and taken only in the proceeding or action wherein judgment shall be given or rendered, but such appeal shall not be operative as a stay of proceedings or in any manner to affect the foreclosure or action of any other claimant or claimants then pending.

§ 24. When any action is brought in the Supreme Court or County Court under the provisions of this act, the court shall have power to direct that judgment be entered for any deficiency remaining after the enforcement of the judgment originally rendered in such action against the owner or other party interested in said premises affected thereby; and may issue execution against other property, real or personal, of such owner or party interested as aforesaid.

§ 25. Section twenty-two of said act is hereby amended so as to read as follows:

§ 22. The liens created and established by virtue of the provisions of this act shall be paid and settled according to priority of notice filed with the County Clerk, as directed by the fourth Section hereof.

§ 26. Section twenty-three of said act is hereby amended so as to read as follows:

§ 23. All liens created by this act may be discharged as follows: First. By filing with the County Clerk a certificate of the claimant, or his successor in interest,

acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged. Second. By depositing with the Justice or Clerk of the court a sum of money equal to double the amount claimed, which money shall thereupon be held subject to the determination of the lien; or, Third. By an entry of the County Clerk made in the book of liens that the proceedings on the part of the claimant have been dismissed by the court in which it is brought, or a judgment rendered against the said claimant; or, Fourth. By an affidavit of the service of a notice from the owner or party in interest, as aforesaid, or his or their agent, attorney, contractor or subcontractor, to the claimant, requiring such claimant to commence an action for the enforcement of his lien, and the failure of said claimant to commence an action as provided by Section twenty of this act.

§ 27. Section twenty-four is hereby amended so as to read as follows:

§ 24. All acts heretofore passed for the better security of mechanics and others erecting buildings and furnishing materials in either of the counties of this State, except the counties of Kings, Queens, Erie, New York, Onondaga and Rensselaer, are hereby repealed; but this act shall not be so construed as to affect, enlarge, invalidate or defeat any lien or right to a lien now existing, or any proceeding to enforce such liens now pending by virtue of the provisions of the acts hereby repealed.

§ 28. This act to take effect immediately.

AMENDMENT OF 1874.

Relating to Erie County.

LAWS OF 1874.—CHAP. 551.

Passed May 22, 1874.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. The provisions of chapter four hundred and eighty-nine of the laws of eighteen hundred and seventy-three, amending certain acts for the better security of Mechanics and others erecting buildings in certain counties in this State, are hereby extended and declared to be applicable to the county of Erie, except the city of Buffalo.

§ 2. This act shall take effect immediately.

"STATE ACT" AMENDMENT OF 1875.

In relation to Improvements made upon Building Lots

LAWS OF 1875.—CHAP. 233.

Passed May 1, 1875; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. Section one of Chapter 489 of the Laws of 1873, entitled "An Act to amend an Act entitled 'An Act for the better security of Mechanics and others erecting Buildings in the Counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess,'" passed April 17th, 1854, and as amended by Chapter 558 of the Laws of 1869, entitled "An Act for the better security of Mechanics and others erecting Buildings in either of the Counties of this State, except the Counties of Erie, Kings, Queens, New York, and Onondaga," is hereby amended so as to read as follows:

§ 1. Any person who shall hereafter perform any labor in erecting, altering, or repairing any house, building, or appurtenances to any house, building, or building lot, including fences, side-walks, paving, wells, fountains, fish-ponds, fruit, and ornamental

trees, and every improvement whatever to any such house, building, or building lot in either of the counties of this State, except Kings, Queens, New York, Onondaga, and Rensselaer, and except the City of Buffalo, or who shall furnish any materials therefor, with the consent of the owner, being such owner as is in this section hereinafter described, shall, on filing with the County Clerk of the county in which the property is situated, the notice prescribed by the fourth Section of this act, have a lien for the value of such labor and materials upon such house, building, or appurtenances, and upon the lot, premises, parcel, or farm of land, upon which the same shall stand, to the extent of the right, title, and interest of the owner of the property, whether owner in fee or of a less estate, or whether a lessee for a term of years thereafter, or vendee in possession under a contract existing at the time of the filing of said notice, or any right, title, and interest in real estate against which an execution at law may now be issued under the general provisions of the statutes in force in this State, relating to liens of judgment and enforcement thereof.

§ 2. This act shall take effect immediately.

KINGS AND QUEENS' ACT OF 1862.

[In Force.]

LAWS OF 1862.—CHAP. 478.

AN ACT *for the better security of Mechanics, Laborers and others who perform labor or furnish Materials for Buildings and other improvements on land in the Counties of Kings and Queens.*

Passed April 24, 1862; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. Any person who shall hereafter perform any labor or furnish any materials in building, altering or repairing any house, building or other improvement upon lands or appurtenances to such house or other building, by virtue of any contract with the owner thereof, or his agent, or with any contractor or sub-contractor, or any person permitted by the owner of such lands to build, repair, alter or improve as aforesaid within the counties of Kings or Queens, shall, upon filing the notice prescribed in the third Section of this act, have a lien for the value of such labor and materials upon such house, building and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title and interest at that time existing, of such owner, in the manner and to the extent

hereinafter provided; but such owner shall not be obliged to pay for or on account of such house, other building or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract, except in the case hereinafter provided. But if any such owner contractor, or sub-contractor, or agent for either of them shall pay any person any money on any contract for building or repairing any building by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, and the amount still due the contractor or his assigns after such payment has been made, shall be insufficient to satisfy the demands made in conformity to the provisions of this act, the owner shall be liable to the amount that would have been due and owing to said contractor or his assignee at the time of the filing of the notice made in the third Section of this act, in the same manner as if no such payment had been made. In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner within the meaning and intent of this act, until a deed shall have been actually delivered so as to pass the fee simple of said promise.

§ 2. Any claimant, under or by virtue of any such lien or any such notice, may, after such labor has been performed or materials furnished, and after the filing of the notice mentioned in the third Section of this act, enforce or bring to a close such lien, by a civil action in a Court of Record in the city or county in

which such lands or any portion of them may be situated; subject, however, to the following provisions and restrictions, namely:

First. The manner and form of instituting and prosecuting any such action to judgment, including the personal service of process therein shall be the same as in other civil actions in the court in which the same may be brought except as herein otherwise provided.

Second. The summons shall be in the form and manner and as required by the second sub-division of Section one hundred and twenty-nine of the Civil Code of Procedure.

Third. The claimant under said lien, who shall be the plaintiff in the action, shall annex to his complaint or set forth therein, a copy of the notice mentioned in the third Section of this act, and demand an accounting and settlement in such court of the amount due or claimed to be due for the labor performed or materials furnished as aforesaid, and such complaint shall contain such other matter and allegations as may be material and proper to establish the claim and cause of action of the claimant and plaintiff.

Fourth. The pleadings shall be in manner, form and substance the same as required by law in civil actions and in accordance with the rules and practice of the court in which the action may be brought, and such action shall be brought to an issue and to trial, put upon the calendar, tried, judgment had and entered, and appeal be taken therefrom, and costs taxed and recovered pursuant to such law, rules and practice in such civil actions in which the summons is, as mentioned in subdivision two of this Section, and such ac-

tion shall be governed and the judgment thereon enforced in the same manner as upon issues joined and judgments rendered in all other such civil actions aforesaid.

§ 3. Within three months after the performance of such labor, or the furnishing of such materials, the contractor, sub-contractor, laborer, person furnishing materials, or other claimant, shall serve a notice in writing upon the County Clerk of the county, or counties aforesaid, in which the land and premises, or any portion thereof, may be situated, specifying the amount of the claim and the person against whom the claim is made, the name of the owner of the building, and the situation of the building by its street and number, if the number be known. The said County Clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "Lien Docket," which shall be suitably ruled in columns, headed "claimants," "against whom claimed," "owners," "building," "amount claimed," "date of notice, hour and minute," and "what proceedings have been had." The names of owners and persons against whom the claim is made shall be inserted in alphabetic order. A fee of ten cents shall be paid to the County Clerk on filing such lien. A copy of said notice shall be served on said owner by delivering the same when personally, or if he be out of this State by delivering the same to his agent personally; and after such service such owner shall not be protected in any payments made by him to such contractor or other claimant in this Section specified.

§ 4. In case the defendant or defendants shall not

answer the plaintiff's complaint within the time, and as required by law, the plaintiff may apply to the court on proof of the service of the summons and complaint, and that no answer has been served, as required by the summons, for a writ of inquiry, and the same may be issued to the Sheriff of the county in which the action may be brought to assess the amount of such claim, or the amount of such claim may be assessed by the court, and upon the return of the writ of inquiry or the assessment by the court, judgment shall be entered upon the same and execution shall issue for the enforcement of said claim, so adjudicated and established in the same manner as in analogous cases upon other judgments in such court.

§ 5. A transcript of every judgment rendered, headed "Lien Docket," shall be furnished by the Clerk of the court to the successful party, who may file the same with the County Clerk, whose duty it shall be to enter the name of the court and the amount of the judgment, or when the judgment is against the claimant, after the expiration of thirty days if no appeal has been taken, the word discharged under the last head in his docket.

§ 6. Costs shall be allowed upon the same principles and by the same rules in the action as they are now allowed by statute in civil actions aforesaid, and shall form a part of the judgment except in cases where the amount of the recovery is less than fifty dollars, no more costs than damages shall be allowed to the party recovering such judgment.

§ 7. The lien may be discharged as follows:

1st. By filing a certificate of the claimant or his suc-

cessor in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is discharged.

2d. By the deposit with the Clerk, if before suit, of a sum of money equal to the amount claimed, or, after suit, equal to such amount and the amount of costs incurred, which money shall thereupon be held subject to the lien.

3d. By an entry of the Clerk made in the book of liens, after one year has elapsed since the filing of the claim, stating that no notice has been given to him of legal steps to enforce the lien.

4th. By an affidavit of service of a notice from the owner to the claimant, requiring him to commence an action for the enforcement of his lien, on or before a certain hour, a day specified in said notice, and the lapse of thirty days thereafter without any affidavit from the claimant being filed of the issuing or service of the summons and complaint in an action for an enforcement of such lien.

5th. By the satisfaction of the lien, or a final judgment in an action for the enforcement thereof.

§ 8. Every lien created under this act shall continue until the expiration of one year from the creation thereof, and until judgment rendered in any proceedings for the enforcement thereof.

§ 9. Whenever judgment shall be rendered in favor of the claimant in any proceeding commenced under this act, such judgment shall direct the sale of the interest of the owner in the land and premises upon which the lien exists, to the extent of the right of such owner at the time of the filing of the notice of lien in

pursuance of this act, and that the proceeds of such sale shall be applied to the payment of the costs of the action and proceeding, and of the amount found to be due to such claimant or plaintiff, and that the residue of such proceeds be paid to the Clerk of the Court in which such action or proceeding may have been instituted, to abide the further order of the court.

§ 10. The owner may apply to the court for an order directing the Clerk to pay him the surplus proceeds of such sale so paid to the said Clerk, upon producing the certificate of the County Clerk of the county or counties in which any portion of said land and premises may be situated that there are no liens docketed in his office against or affecting the said premises which have been filed under this act, and which remain unsatisfied.

§ 11. If it shall appear that there other liens on file with the Clerk of either of said counties affecting the said premises, notice of such application shall be given to the claimants respectively filing the notices creating such liens, and thereupon the said court shall distribute such surplus proceeds among the parties entitled thereto, according to their respective rights and priorities, and may order a reference to take proofs in relation to such rights and priorities.

§ 12. In all sales under judgments to be rendered in these proceedings, the interest of the owner shall be sold subject to all prior liens existing thereon, unless the claimants under such liens shall be made parties to the proceedings, in which case the court shall settle the rights of the respective claimants, and the payment

of the owner of any valid lien, or of any judgment recovered in pursuance of this act, shall enure to him as a payment to the amount thereof to the contractor or sub-contractor, as the case shall be.

§ 13. When the action or proceedings are commenced by a person having a claim against a contractor, with the owner, or against a sub-contractor with the contractor or other sub-contractor, such contractor or sub-contractor may be made a defendant with such owner, and judgment may be rendered against the contractor or sub-contractor for the amount which shall be found owing by him, in addition to the judgment hereinbefore provided for against such owner, and the court may award costs against such of the parties as shall be just.

§ 14. Chapter three hundred and thirty-five of the Laws of eighteen hundred and fifty-three, entitled "An Act for the better security of Mechanics and others erecting Buildings, performing work or furnishing Materials, in the County of Kings," passed June eighth, eighteen hundred and fifty-three, and chapter two hundred and four of the Laws of eighteen hundred and fifty-eight, passed April fourteenth, eighteen hundred and fifty-eight, so far as the same applies to the counties of Kings and Queens, aforesaid, are hereby repealed.

§ 15. This act shall take effect immediately.

ONONDAGA ACT—(1864).

[In force as amended in 1866.]

LAWS OF 1864.—CHAP. 366.

AN ACT *for the better security of Mechanics and others erecting Buildings and furnishing Materials therefor, in the County of Onondaga.*

Passed April 25, 1864; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. Any person who shall, in pursuance of any contract, express or implied, either with the owner of the property or any contractor, perform any labor or furnish any materials in building, altering, or repairing any house or other building, or appurtenances to any house or other building, in the County of Onondaga, to the amount of twenty dollars or over; or any person who has made a contract for the same, shall, until the end of three months after the performance of such labor or furnishing materials, be deemed to have an equitable lien for the same upon such house or building or appurtenances, and the land upon which the same may be situated.

§ 2. As against the owner of the property himself, no notice shall be necessary to establish such lien. As against all other persons who have no actual notice thereof, the only evidence which shall be necessary for

a party to signify that he claims such lien shall be the filing of a notice with the County Clerk of the County of Onondaga, at any time while the business is progressing, or within the said period of three months, which shall state the nature of the claim, whether for labor or material; the premises on which he claims the lien, and the lot or block of which they form a part; the amount thereof, and the date from which he claims it to have commenced; and as the work progresses, the party may secure successive liens by giving notice as aforesaid. The Clerk shall docket the notice in a book to be provided for that purpose, and his fee therefor shall be twenty-five cents.

§ 3. The filing of such notice shall not prejudice the rights of any bona fide purchaser, or incumbrancer for value, whose purchase or incumbrance was made before the filing of such notice, and who had no actual knowledge of the lien claimed. Upon the foreclosure of any such lien, if the amount of the claim established be fifty dollars or over, the plaintiff shall recover his costs and disbursements according to the same rates as in suits for the foreclosure of mortgages. If the amount be less than fifty dollars, then the plaintiff shall recover for costs and disbursements one-half as much as the amount so established as aforesaid, and no more unless it should be necessary to sell the premises, in which case the fees of the officer selling shall be the same as upon the sale of mortgaged premises under a decree for foreclosure and sale.

§ 4. At any time within six months after the completion of the work or furnishing materials, or after the claim is due, if time is given, the claimant or his

assigns may institute proceedings for the foreclosure of said lien in the general manner now provided by the general lien law of the State.

§ 5. This act shall take effect immediately.

ONONDAGA ACT—AMENDMENT OF 1866.

Relating to Payments made by the Owner to the Contractor.

LAWS OF 1866.—CHAP. 788.

[*Title Omitted.*]

Passed April 24, 1866.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. The act entitled "An Act for the better security of Mechanics and others erecting Buildings and furnishing Materials therefor, in the County of Onondaga," passed April twenty-fifth, one thousand eight hundred and sixty-four, is hereby amended by adding at the end of the second section thereof the following words, viz.:

"When such labor or material is performed or furnished to a contractor or sub-contractor, all payments made by the owner to either, in good faith, to apply

on his contract, shall operate to extinguish the lien aforesaid, unless written notice of the lien is served on the owner of the premises before such payment, stating that the same is then or immediately thereafter will be claimed. When the owner is compelled to discharge liens under this act, he shall have the right to deduct the amount of the same from the contract price of the contractor or sub-contractor, for whom the labor was performed or material furnished.

§ 2. This act shall take effect immediately.

RENSSELAER ACT OF 1865.

[In Force.]

LAWS OF 1865.—CHAP. 778.*

AN ACT *for the better security of Mechanics and others erecting, altering, or repairing Buildings and furnishing Materials therefor, in the County of Rensselaer.*

Passed June 26, 1865.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECT. 1. Any person who shall hereafter perform any labor, and any person who shall furnish any materials, in erecting, altering, or repairing any house,

* This Act not being signed by the Governor in time to bind with the Session Laws of 1865, will be found in the Laws of 1866.

building, or additions and appurtenances to any house or building in the County of Rensselaer shall, on filing with the Town Clerk of the town in which the property is situated, or, if situated in the City of Troy, then with the Clerk of the County of Rensselaer, the notice prescribed by the fourth section of this act, have a lien for the value of such labor and materials upon such house or building or additions and appurtenances, and upon the lot, parcel, or farm of land upon which the same shall stand, to the extent of the right, title, and interest of the owner of the property existing at the time of filing the said notice.

§ 2. Whenever the labor performed and materials furnished shall be upon the credit of any contractor who shall have made a contract therefor with the owner or his agent of the property, or upon the credit of any sub-contractor or assignee of any contractor or sub-contractor, the provisions of this act shall not oblige the owner or his agent of the property to pay for or on account of any labor performed or materials furnished for such house, building, or additions and appurtenances any greater sum or amount than the price stipulated and agreed to be paid therefor in and by said contract, except as in the next Section provided.

§ 3. If the owner or his agent of any house, building, additions and appurtenances erected, altered, or repaired by any contract, express or implied, shall pay to any person, on such contract, by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, and the amount still due the contractor or his assignee, after

such payment has been made, shall be insufficient to satisfy the demands made in conformity to the provisions of this act, the owner or his agent shall be liable to the amount that would have been due and owing to said contractor, sub-contractor, laborer, or persons furnishing materials at the time of the filing of the notice mentioned in the first Section of this act, in the same manner as if no such payment had been made.

§ 4. At the time of the commencement of such labor or furnishing such materials, or at any time during the progress of such labor and furnishing such materials, or within thirty days after the performance and completion of such labor or the final furnishing such materials, the contractor, sub-contractor, laborer, or person furnishing materials shall serve a notice in writing upon the Town Clerk of the town where the property is situated, and if the property is located in the City of Troy, then upon the Clerk of the County of Rensselaer, specifying the nature and amount of work performed, or the materials furnished or to be furnished, and the persons against whom the claim is made, the name of the owner or his agent of the building; and if in the City of Troy or any village in the county, the situation of the building, by street and number, if the street be known. The Town Clerk or the County Clerk, as the case may be, shall enter the particulars of such notice in a book to be kept for that purpose in their respective offices to be called the "Mechanics' and Laborers' Lien Docket," in which shall be entered alphabetically the names of the owners of the property and opposite to them the names of the contractor,

sub-contractors, laborers, or other persons claiming a lien and a sufficient description of the premises on which such work is, or to be done, or materials are or to be furnished, and the day and time of filing and entering the notice of such lien. And the fees of the clerks for filing and entering such lien shall in each case be fifty cents; and no lien shall attach to said lot, buildings, and appurtenances unless such notice be served and filed and entered by said town or county clerks, as the case may be, and said lien when so filed and entered shall thereafter operate as a lien and incumbrance upon such house, building, and appurtenances, and upon the lot, parcel, or farm of land upon which the same shall stand, except that no lien so filed and entered by any person other than the contractor shall be effective unless a copy of such notice so filed and entered is served on such owner or his agent personally or by leaving the same with some person of competent age at the place of residence of such owner or his agent within five days after the filing and entry of said notice with the Clerk of the town or county as the case may be.

§ 5. Any person performing labor or furnishing materials, in availing himself of the provisions of this act shall, upon the trial or at the assessment of damages produce evidence to establish the value of such labor or materials, and that the same was performed or used in the erection, altering, or repairing of such house, building, additions, and appurtenances.

§ 6. Any contractor, sub-contractor or laborer performing any work, or any person furnishing any materials as above provided, may, after such work and

labor has been performed or materials furnished, and the service of the notice required in the fourth Section of this act, bring an action in the Supreme Court, in the County of Rensselaer, or in the County Court of said county, when the amount exceeds fifty dollars, to enforce said lien, which said action shall be commenced by serving a summons containing a full and particular statement of the facts constituting the nature of the claim and the amount thereof on the owner or his agent of the property, requiring the said owner to appear and answer the same, and to serve a copy of such answer, together with a notice of any set-off that he may have within twenty days after the service of said summons, exclusive of the day of such service, on the claimant or his attorney; or in default thereof the claimant will take judgment against the said owner for the amount claimed to be due for the work and labor performed or the materials furnished, with interest thereon and costs of the action. To which said summons shall be annexed and served with said summons a bill of particulars of the amount claimed to be due from such owner, his contractor or sub-contractor or assignee, verified by the oath of the claimant to the effect that the same is in all respects just and true.

§ 7. Within twenty days after the service of said summons and bill of particulars, the defendant in said summons shall serve the claimant or his attorney with a copy of his answer and notice of set-off, if any he has, duly verified by the oath of the owner or his agent or contractor, to the effect that the same is in all respects just and true, or in default thereof judg-

ment may be entered and enforced as hereafter provided.

§ 8. When the amount of the lien claimed is for one hundred dollars or under, the claimant may commence such action before a Justice of the Peace of the town in which the premises is situated, and if located in the City of Troy, then in the Justice's Court of said city, by serving a summons personally upon the owner or his agent, requiring such owner to appear before a Justice of the town in which the property is situated, or in the Justice's Court of said city if located therein, which said summons shall contain a statement of the facts constituting the claim and the amount thereof, and shall require such owner to appear before said Justice or in said Justice's Court, at a time certain not less than twenty days after such service, and answer the same, or in default thereof that the claimant will take judgment against such owner for the amount so claimed to be due, with interest thereon and costs, and at the time of the service of the summons in this Section mentioned, a bill of particulars of the amount so claimed to be due to the claimant, duly verified, shall be annexed to and served with said summons.

§ 9. In case the said summons in either of the sixth or eighth Sections of this act cannot be served personally on such owner or his agent by reason of his absence from the State or county, as the case may be, or being concealed therein, then such service may be made by leaving or mailing a copy of such summons, with such bill of particulars annexed, at the last known place of residence of said owner or his agent, and publishing a copy of said summons only once in

each week for three weeks successively in a newspaper published in the county where the property is situated; and in case of the service of such summons by publication, then the said twenty days to answer shall commence to run from the last day of the publication of said summons.

§ 10. In case said owner shall not appear as required in and by the summons given in pursuance of the sixth and eighth Sections of this act, then on filing with the County Clerk, when the action to enforce the claim is brought to the Supreme Court or County Court, or with the Justice or in the Justice's Court of the City of Troy. When the action is before the said Justice or in said Justice's Court, an affidavit of the service of said summons and bill of particulars, and the failure of the owner of the property to appear as therein required, the amount of such claim may be assessed by the said County Clerk if the action is in the Supreme Court or County Court, and if before a Justice or in the said Justice's Court, then by such Justice or said Justice's Court, and upon the assessment of damages as aforesaid, judgment shall be entered upon said assessment establishing the amount of said lien, with the costs and disbursements, and execution shall thereupon issue for the collection and enforcement of said claim, so adjudicated and established in the same manner as executions upon other judgments in said courts, in actions arising on contract for the recovery of money, only except that the execution shall direct the officer to sell the right, title, and interest which the owner had in the premises at the time of filing the notice prescribed in the fourth Section of this act or at any time thereafter.

§ 11. On the appearance of both parties before the Justice, or in said Justice's Court, the owner shall put in an answer in writing, duly verified, with a bill of particulars of his set-off (if any) annexed, and the issue formed by the service of the summons and bill of particulars on the part of the complaint and the answer and bill of particulars of set-off on the part of the owner shall be tried and governed by the same rules as other issues in Justice's Court, and the judgment therein shall be enforced, if for the claimant, as provided by the tenth Section of this act, and if for the owner, as in other actions arising on contract.

§ 12. When the action is brought in the Supreme Court or in the County Court, the issue shall be formed by the service of the summons and the bill of particulars on the part of the complainant as heretofore directed, and the owner's answer, with a bill of particulars of set-off, if any, duly verified, annexed to said answer.

§ 13. At any time after the issue shall be so joined in the Supreme Court or County Court, and at least fourteen days before the commencement of the court, the same may be noticed for trial and put upon the calendar of said courts by either party furnishing the Clerk of the court with a note of issue as now required in other actions, and the same shall be governed and tried in all respects as other issues joined, and judgment rendered in other actions arising on money demands upon contracts in said courts, and the judgment thereupon shall be enforced, if for the claimant, as provided by the tenth Section of this act, and if for the owner, as in other actions arising on contract.

§ 14. Whenever a judgment shall be rendered against the owner and in favor of any person for the performance of any labor, or for the furnishing of any materials, and the owner have funds in his possession due to the contractor, the costs and disbursements of the proceedings shall be deducted from such funds, unless otherwise directed by the court in which the action is brought.

§ 15. Costs and disbursements shall be allowed to either party upon the principles and by the same rules in such proceedings as they are now allowed by law in actions arising on contract and shall be included in the judgment recovered; and the expenses incurred in serving said summons upon the owner by publication shall be allowed by the Justice or in the said Justice's Court and added to the amount of costs now allowed in Justices' courts.

§ 16. A transcript of every judgment under this act, headed "Lien Docket," shall be furnished by the Clerk of the county to the successful party, who may file the same with the Clerk of any other county in this State, and the same shall thereafter be a lien on the real property in the county where the same is filed and docketed of every person against whom the same is rendered, in like manner and to the same extent as to other actions for the recovery of money arising on contract when the judgment is against the claimant, and the Town Clerk or County Clerk, as the case may be, shall enter the word "discharged" under the last head of his lien docket on receiving a transcript from the Justice or said Justice's Court that judgment has been rendered against the claimant, or, if in the Supreme Court or

County Court, upon filing and docketing such judgment against the claimant.

§ 17. Such owner or his agent may at any time give public notice in the same manner as notice is required to be given for the sale of real estate by virtue of an execution to all persons having claims under any of the provisions of this act, against such house, building, or additions and appurtenances at the time of the first publication of such notice, to present the same with vouchers in support thereof, to any Justice of the Peace in the town where such building is situated, or, if located in the City of Troy, at the office of the Clerk of said county, on or before a certain day and hour to be specified in said notice, and to be at least two weeks from the first publication thereof, and, in case of the failure of any person or persons to present such claims, as required in and by said notice, each and every person so failing shall forever lose the benefit and be precluded of the said lien.

§ 18. Whenever such owner or his agent shall be proceeded against by a contractor, pursuant to the provisions of this act, it shall be lawful for him to give the notice prescribed by the preceding Section and present as a set-off all claims and liens thereupon presented and established, and the Justice before whom or the court in which proceedings shall be commenced may, upon the request of the owner or his agent, grant a stay of proceedings sufficient to enable the owner or his agent to give such notice and call in all such claims, which said claims, if established and allowed by the Justice or court, shall be a set-off to such contractors claimed to the amount so allowed.

§ 19. Every lien created under the provisions of this act shall continue until the expiration of five years, unless sooner discharged by the court or some legal act of the claimant in the proceedings. But, when a judgment is rendered therein and docketed with the County Clerk, it shall be a lien upon the real property of the person against whom it is obtained to the extent that other judgments are now made a lien thereon.

§ 20. After a judgment shall have been rendered in pursuance of the provisions of this act, either party may appeal therefrom in the same manner and within the time appeals may now be taken in action for the recovery of money arising on contract; and said appeal shall be thereafter heard, governed, and determined upon the same principles and by the same rules that appeals in said actions are now heard, governed, and determined, with like costs and disbursements, and the judgment thereon enforced in the same manner as judgments on appeals are now enforced and collected.

§ 21. The liens created and established by virtue of the provisions of this act shall be paid and settled according to the priority of the notice filed with the Town Clerk or County Clerk, as described by the fourth Section of this act.

§ 22. All liens created by this act may be discharged as follows: 1st. By filing with the Town Clerk or County Clerk, as the case may be, a certificate of the claimant or his successors in interest, acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged; or, 2d. By depositing with the Justice or the

Clerks of the court a sum of money equal to double the amount claimed, which money shall be thereupon held, subject to the determination of the lien; or, 3d. By an entry of the Town Clerk or County Clerk, as the case may be, made in the book of liens, that the proceedings on the part of the claimant have been dismissed by the Justice or court in which it is brought, or a judgment rendered against the said claimants; or, 4th. By an affidavit of the service of a notice from the owner or his agent, attorney, contractor, or sub-contractor to the claimant, requiring such claimant to commence an action for the enforcement of said lien within twenty days after service of said notice and the failure of said claimant to commence an action as aforesaid.

§ 23. All acts heretofore passed for the better security of mechanics and others erecting buildings and furnishing materials, so far as the same are applicable to the County of Rensselaer, are hereby repealed; but this act shall not be so construed as to affect, enlarge, invalidate, or defeat any lien or right to a lien now existing, or any proceeding to enforce such liens now pending by virtue of any of the provisions of the act hereby repealed.

§ 24. This act shall take effect immediately.

GENERAL PROVISIONS APPLICABLE TO ALL ACTS PASSED PRIOR TO 1870 AND 1872.

Laws of 1870.—Chap. 529.

AN ACT *in relation to Mechanics' Liens.*

Passed May 2, 1872.

Secr. 1. The provisions of the laws relating to mechanics' liens heretofore passed, shall apply to bridges and trestle work erected for railroads, and materials furnished therefor, and labor performed in constructing said trestle work, and other structures connected therewith, and the time within which said liens may be filed shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work, and structures connected therewith, or the time from which said materials shall have been delivered. This act shall apply to all uncompleted work commenced previous to the passage of this act.

§ 2. This act shall take effect immediately.

See Collins *v.* Drew, cited on page 435. But the lien must be filed and enforced against the road in its entirety, and not against the specific bridges or other property upon which the work and materials were applied. Graham *v.* Mt. Sterling Coal R. Co., 14 Bush (Ky.),

LAWS OF 1872.—CHAP. 669.

AN ACT *in relation to Mechanics' Liens.*

Passed May 13, 1872.

SECT. 1. All the provisions of the laws relating to mechanics' liens heretofore passed shall apply to wharves, piers, bulkheads, and bridges, and materials furnished therefor, and labor performed in constructing said wharves, piers, bulkheads, and bridges, and other structures connected therewith, and the time within which said liens may be filed shall be thirty days from the time when the last work shall have been performed on said wharves, piers, bulkheads, and bridges, and structures connected therewith, or the time from which said material shall have been delivered. This act shall apply to all incomplete work commenced previous to the passage of this act.

§ 2. This act shall take effect immediately.

This Act furnishes the *exclusive* rule in regard to the time of filing in such cases, and applies to sheds and all other structures erected upon or necessarily connected with wharves or piers. Collins *v.* Drew, 67 N. Y., 149.

LAW APPLICABLE TO RAILROADS.

Laws of 1875.—Chap. 392.

§ 1. **Who may acquire Lien against Railroad Corporation.—To what Property Lien Attaches.**—Any person who shall hereafter perform any labor for a railroad corporation, shall, on filing with the County Clerk of any county in which such railroad corporation is situated, or through which the road of such corporation passes, the notice prescribed by the second section of this Act, have a lien for the value of such labor upon such railroad track, rolling stock and appurtenances, and upon the land upon which such railroad track and appurtenances are situated, to the extent of the right, title and interest of such railroad corporation in the property existing at the time of filing the said notice.

§ 2. **Notice of Lien, when and how filed.**—Within thirty days after the performance and completion of such labor, such person shall file a notice, in writing, with the County Clerk of the County where the property is located, specifying the amount of claim, and the corporation against whom the claim is made. The County Clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "Lien Docket," with the name of claimant, amount claimed, the name of such corporation against which such claim is made, and the date of the filing of the notice, hour and minute. A fee of ten cents shall be paid to said Clerk on filing such lien, and said notice, when so filed, shall thereafter operate as an incumbrance upon said property.

§ 3. **What Evidence Lienor must Establish upon the Trial.**—Any person performing labor, in availing himself of the provisions of this Act, shall, upon the trial, or at the

assessment of damages, produce evidence to establish the value of such labor, and that the same was performed for such railroad corporation.

§ 4. **Action to Enforce Lien, where brought.**—Any laborer performing any work, or assignee thereof, may, after such labor is performed, and the service of the notice required by the first section of this Act, bring an action in any of the Courts of the County in which said property is situated to enforce said lien, requiring such railroad corporation to appear, by attorney, within thirty days after such service and answer the same, or, in default thereof, the claimant may take judgment for the amount of claim and costs.

§ 5. **Lien to continue One Year.**—Every lien created under the provisions of this Act shall continue until the expiration of one year, unless sooner discharged by the Court or some legal Act of the claimant in the proceedings; but when a judgment is entered therein, and docketed with the County Clerk within said year, it shall be a lien upon the real property of the railroad corporation against whom it is obtained, to the extent that other judgments are now made a lien thereon.

§ 6. **Priority of Liens.**—The liens created and established by virtue of the provisions of this Act shall be paid and settled according to the priority of the notice filed with the County Clerk, as directed by the second section hereof.

§ 7. **How Liens may be Discharged.**—All liens created by this Act may be discharged as follows:

1. By filing with the County Clerk a certificate of the claimant, or his successors in interest, acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged; or

2. By depositing with the Court or Clerk of the Court a sum of money equal to double the amount claimed, which money shall be thereupon held subject to the determination of the lien; or

3. By an entry of the County Clerk, made in the book of liens, that the proceedings on the part of the claimant have been dismissed by the Court in which it is brought, or a judgment rendered against the said claimant; or

4. By an affidavit of the service of a notice from such railroad corporation, or its attorney, to the claimant, requiring such claimant to commence an action for the inforcement of said lien within twenty days after service of said notice and the failure of said claimant to commence an action as aforesaid.

§ 8. **Personal Liability of Stockholders, how Enforced.**—Each and all the stockholders of such corporation shall be jointly and severally liable for the debts due or owing to any of its laborers or servants, other than contractors, for personal service for ninety days' service, or less than ninety days' service, performed for such corporation, but shall not be liable to an action therefor, before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholders; before such laborer or servant shall charge such stockholders for such ninety days' service or less than ninety days' service, he shall give notice in writing, within twenty days after the performance of such service, that he intends to so hold him liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied, as above mentioned; and every

such stockholder against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself.

LAW APPLICABLE TO PUBLIC BUILDINGS.

LAWS OF 1878.—CHAP. 315.

§ 1. Any person or persons who shall hereafter as laborer, mechanic, merchant or trader, in pursuance of, or in conformity with the terms of any contract made between any person or persons and any incorporated City in the State of New York, perform any labor or furnish any material toward the performance or completion of any contract made with said City, on complying with the second section of this Act, shall have a lien for the value of such labor or materials or either, upon the moneys in the control of the said City, due or to grow due under said contract with said City to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and par value of all such work and materials, to the extent of the amount due or to grow due on said contract, in favor of every person of persons who shall be employed or furnish materials to the person or persons with whom the said contract with said City is made, or the sub-contractors of said person or persons, their assigns or legal representatives, provided that no City shall be required to pay a greater amount than the contract price or value of the work and the materials furnished, when no specific

contract is made in the performance of said work by the contractor.

§ 2. Claim of Lienor, what to contain.—When and how Filed.—At any time before the whole work to be performed by the contractor for the City is completed or accepted by the City, and within thirty days after the same is so completed or accepted, any claimant may file with the head of the department or bureau having charge of said work, and with the financial officer of said city, notices stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, from whom due, and if not due, when it will be due, giving the amount of the demand after deducting all just credits and offsets, with the name of the person by whom employed, or to whom materials were furnished; also a statement of the terms, time given, conditions of his contract, and also that the work was done or materials were furnished to the said contractor, and were actually performed or used in the execution and completion of the said contract with said City, but no variance as to the name of the contractor shall affect the validity of the said claim or lien.

§ 3. Liens to be Entered.—What Entry to contain.—The financial officers of said City shall enter the claims in a book kept for that purpose by him, called the "Lien Book." Such entry shall contain the name and residence of claimant, the name of the contractor, the amount and date of the filing and a brief designation of the contract upon which the claim is made.

§ 4. Time within which Lien must be Foreclosed.—Lis pendens, where Filed.—No lien provided for in this Act shall be binding upon the property therein described, unless an action be commenced within ninety days from the

filing of the same, and a notice of pendency of said action be filed with the financial officer of the city.

§ 5. When Lien Attaches.—Extent of Lien.—The lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any funds which may be due or to grow due to the said contractor from said City, under the contract against which the lien is filed.

§ 6. Civil Actions to enforce Liens, where brought.—Any claimant who has filed the notice mentioned in the second section of this Act, may enforce his claim against the said fund therein designated and against the person or persons liable for the debt by a civil action. Actions to determine or terminate said liens may be commenced by the contractor or said City in any Court of competent jurisdiction.

§ 7. Who must be made Parties.—Priority of Claims.—The plaintiff must make all parties who have filed claims the contractor, and the said City, parties defendant, and as to all parties against whom no personal claim is made, the plaintiff may, with the summons, serve a notice stating briefly the object of action, and that no personal claim is made. But all parties who have filed claims under this Act may, by answer in such action, set forth the same, and the court in which the action is brought, may decide as to the extent, justice and priority of the claims of all parties to the action.

§ 8. Judgments in Foreclosure. — Execution.— Appeals. — The court in which the action is brought shall determine the validity of the lien, the amount due from the debtor to the contractor under his contract, and from the contractor to the respective claimants, and shall render judgment, directing that the said city shall pay

over to the claimants, for work done and materials furnished in the execution of the said contract or contracts, whose claims or liens it shall hold to be valid and just, in the order of their priority as determined by said court to the extent of the sum found due to said claimants from their contractor, so much of said funds or money which may be due from the said City to the contractor, under his contract, against which the lien is filed, as will satisfy their liens or claims, with interest and costs, to the extent of the amount due from said City to said contractor. The judgments rendered under this act may be enforced by execution, and an appeal may be taken therefrom in the same time and manner as in civil actions.

§ 9. Successive Liens.—Priority according to Date of Filing.—In case of successive liens, or a number of liens, in favor of different persons, their rights and priorities shall be determined as follows: Persons standing in equal degrees as co-laborers, or various persons furnishing materials shall have priority according to the date of the filing of their liens. When several lien notices are filed for the same demand, the judgment shall provide for the proper payments according to priority, so that, under liens filed, double payments shall not be required.

§ 10. When Actions may be Consolidated.—When separate actions are commenced, the Court in which the first action was brought may, upon the application of the said City, consolidate them.

§ 11. Costs in the Discretion of the Court.—Costs in all actions shall rest in the discretion of the Court, and shall be awarded to or against the plaintiff or defendants, or any or either of them, as may be just.

§ 12. **Right to Personal Action not affected.**—Nothing contained in this act shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

§ 13. **How Lien may be Discharged.**—The lien may be discharged as follows: First. By filing a certificate of the claimant, or his successor in interest, duly acknowledged and proved, stating that the lien is discharged. Second. By lapse of time, when ninety days have elapsed since the filing of the claim, and no action shall have been commenced to enforce the claim. Third. By satisfaction of any judgment that may be rendered in actions to foreclose said liens or claims.

§ 14. **Term "Contractor" defined.**—The term "contractor," as used in this Act, shall be construed as meaning the person with whom the contract with the said city is made, his assigns or legal representatives.

§ 15. **When Act to take effect.—Repealing Clause.**—This Act shall take effect immediately; but nothing herein contained shall affect the validity of any claims or liens upon moneys due or to grow due under contracts made by cities prior to its passage. All Acts and parts of Acts inconsistent with the terms of this Act are hereby repealed.

[Laws of 1870, chap. 385, passed April 26.]

§ 16. **Eight Hours a Legal Day's Work.—Exception as to Farm and Domestic Labor.—Extra Work.**—1. On and after the passage of this act, eight hours shall constitute a legal day's work for all classes of mechanics, workingmen and laborers, excepting those engaged in farm and domestic labor; but overwork for an extra compensation by

agreement between employer and employee is hereby permitted.

§ 17. **Act to Apply only to Workmen Employed by the State, or a Municipal Corporation.**—2. This act shall apply to all mechanics, workingmen and laborers now or hereafter employed by the State, or any municipal corporation therein, through its agents or officers, or in the employ of persons contracting with the State or such corporation for performance of public work.

§ 18. **Penalty for Violation of this Act.**—3. Any officer or officers, or agents of this State, or of such corporation, who shall openly violate or otherwise evade the provisions of this Act, shall be deemed guilty of malfeasance in office, and be liable to suspension or removal accordingly by the Governor or head of the department to which such officer is attached.

§ 19. **Non-Compliance or Evasion of this Act, a Misdemeanor.** 4. Any party or parties contracting with the State, or any such corporation, who shall fail to comply with, or secretly evade the provisions hereof, by exacting and requiring more hours of labor, for the compensation agreed to be paid per day, than is herein fixed, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine, not less than one hundred nor exceeding five hundred dollars, and in addition thereto, shall forfeit such contract, at the option of the State.

§ 20. **Act of May 9, 1867, Repealed.**—5. Chapter eight hundred and fifty-six of the Laws of eighteen hundred and sixty-seven, entitled "An Act to limit the hours of labor constituting a day's work to eight hours," passed May ninth, eighteen hundred and sixty-seven, is hereby repealed.

§ 6. This Act shall take effect immediately.

ACT RELATING TO OIL WELLS.

LAWS OF 1880.—CHAP. 440.

AN ACT *to provide for the protection of Mechanics and others.*

PASSED May 27, 1880; three fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Any person who shall hereafter perform any labor in or about the sinking, drilling or completing of any oil well, or any well sunk or drilled for oil, or gas, or other volatile or mineral substances, within the State of New York, or in sinking or drilling any water well, sunk or drilled for the purpose of drilling or operating any such oil well or other well as aforesaid, or who shall erect, build, or furnish any tank or other receptacle for oil, gas or water which shall be built, erected or furnished for any of the purposes aforesaid, or who shall perform any labor, or furnish any materials in or for the building or erection of such tank or other such receptacle as aforesaid, or who shall furnish any materials for any of the purposes aforesaid, including tubing, casing, sucker-rods, packers or other appurtenances or appliances to any such well as aforesaid, with the consent of the owner, being such owner as in this section hereinafter described, shall, on filing with the County Clerk of the County in which the property is situated, the notice prescribed by the next section of this Act, have a lien for the value of such labor and materials upon such tank or other receptacle as aforesaid, and upon such well as aforesaid, and appurtenances, and

upon the lot, premises, parcel or farm of land upon which the same shall be situated, to the extent of the right, title and interest of the owner of the property, whether owner in fee or of a less estate, or whether lessee for a term of years thereafter, or vendee in possession under a contract existing at the time of the filing of said notice, or any right, title or interest in real estate against which an execution at law may now be issued under the provisions of the statutes in force in this State, relating to liens of judgment and the enforcement thereof.

§ 2. Within sixty days after the performance and completion of such labor or the final furnishing of such materials, the contractor, sub-contractor, laborer or person furnishing the same, shall file a notice in writing in the office of the Clerk of the County where the property is located, specifying the amount of the claim and the person against whom the claim is made, the name of the owner or of the party in interest as aforesaid of the premises, lot, parcel or farm of land, together with a description of said lot, parcel or farm of land. The County Clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "Lien Docket," which shall be suitably ruled in columns headed "claimants," "against whom claimed," owners and parties in interest, "amount claimed," and the date of the filing of the notice, hour and minute, what proceedings have been had, the names of the owners and parties in interest and the person against whom the claim is made shall be entered in said book in alphabetical order. A fee of ten cents shall be paid to said Clerk on filing said notice, and no lien shall attach to said land, well, tank or other receptacle or appurtenances or appliances, un-

less said notice shall be filed by said Clerk, and when so filed said notice shall thereafter operate as an incumbrance upon said property.

§ 3. Whenever the labor performed or materials furnished shall be upon the credit of any contractor who shall have made a contract therefor with the owner of the property, or such party in interest as aforesaid, whether such contract shall be oral or in writing, or express or implied, or for any specified sum or otherwise, or on the credit of any sub-contractor or the assignee of any contractor or sub-contractor, the provisions of this Act shall not oblige the owner or party in interest as aforesaid, to pay for or on account of any such labor or materials, any greater sum or amount than the price stipulated and agreed to be paid therefor by said contract, or the value of such labor and materials, except as in the next section provided.

§ 4. At the time of the filing of said notice prescribed by the second section of this Act, the person filing said notice may serve upon the said owner, or party in interest as aforesaid, a written notice specifying the amount of the claim, the name of the person against whom the claim is made, and for what labor or materials the claim is made, which said notice shall be served, by delivering the same to such owner or party in interest as aforesaid personally, or if there shall be two or more of such owners or parties in interest, or either or any one of them, or by leaving the same at the place of residence of such owner or party in interest, or if there be two or more, of either or any one of them, or in case said owner or party in interest shall have no place of residence within the County where such property as aforesaid shall be situated, then by mailing said notice to said owner or

party in interest, securely inclosed in a sealed envelope directed to said owner or party in interest at his post-office address, with the postage prepaid thereon, and from the time of the service of such notice as aforesaid, such owner or party in interest shall be liable to said claimant to the amount then due or owing to the contractor, sub-contractor or assignee of such contractor, or sub-contractor, upon whose credit such labor shall be performed or materials furnished as hereinbefore provided. And in any case whether the notice above prescribed shall or shall not be served as above provided upon such owner or party in interest as aforesaid, if such owner or party in interest as aforesaid shall pay, or cause to be paid, to any contractor, sub contractor or assignee, or any other person, any money or other valuable thing for the purpose of avoiding or with intent to avoid any of the provisions of this Act, when the amount still due or to grow due to said contractor, sub-contractor or assignee shall be insufficient to satisfy the demands made in conformity with the provisions of this Act, the owner or other party in interest as aforesaid shall be liable to the amount that would have been due or owing to said contractor, sub-contractor or assignee, at the time of the filing of the notice in the second section of this Act, in the same manner as if no such payment had been made.

§ 5. Any contractor, sub contractor, mechanic, laborer, or other person performing any work or furnishing any materials as above provided, or the assignee of any such person or persons, may, after such labor has been performed or materials furnished, and the filing of the notice provided by the second section of this Act, when the amount of the claim exceeds fifty dollars,

bring an action in the Supreme Court in the County in which the property is situated, or in the County Court of said County, to enforce such lien, which action shall be commenced, and the proceedings therein conducted, and judgment entered in the same manner and to the same effect as in actions brought in said Court to enforce liens, provided by chapter four hundred and two of the laws of eighteen hundred and fifty-four, and the several Acts amending the same, and the said Courts shall have full power to adjust and enforce all the rights and equities between any or all of the parties to such actions, and enforce or protect the same by any of the remedies usual in said Courts.

§ 6. When the amount of the lien claimed is two hundred dollars or under, the claimant may commence his action in a Justice's Court of the town or city in which the premises are located, which action shall be commenced, and the proceedings therein conducted and the judgment entered, and transcript filed in the same manner and with the effect as in actions commenced in Justices' Courts to enforce liens pursuant to said chapter four hundred and two of the Laws of eighteen hundred and fifty-four, and the several acts amending the same.

§ 7. Costs and disbursements, in actions to enforce liens provided for by this Act, shall be allowed to either party upon the principles and by the same rules as are now allowed by law in actions for relief arising on contract, and shall be included in the judgment recovered therein, and the expenses incurred in serving the notice by which such actions shall be commenced by publication may be allowed in Justices' Courts and added to the amount of costs now allowed in said courts.

When the action is brought in the Supreme Court or in a County Court, such direction shall be made in the discretion of the Court as to the payment of costs as shall be just and equitable, and the judgment entered shall specify to whom and by whom the costs are to be paid.

§ 8. A transcript of every judgment rendered under this Act shall be furnished by the Clerk of the County where rendered and docketed to the successful party, who may file the same with the County Clerk of any other County, and the same shall thereafter be a lien on the real property in the County, where the same is filed and docketed, of every person against whom the same is rendered, if for twenty-five dollars or upwards, exclusive of costs, in like manner and to the same extent and enforceable by execution in the same manner, as in other actions for the recovery of money arising on contract.

§ 9. Whenever any judgment shall be entered in any such action as aforesaid, execution shall thereupon issue for the enforcement and collection of such judgment in the same manner as executions are issued upon other judgments in actions on contract for the payment of money only, except that when the judgment is in favor of the claimant the execution shall direct the officer to sell the right, title and interest which the owner or other party in interest had in the premises at the time of filing the notice prescribed by the second section of this Act, and if the same shall be insufficient to satisfy said judgment, then to collect such deficiency as shall remain out of the personal property of such owner or party in interest, or if there be two or more of either of them, or if sufficient personal property cannot be found, then out of the real property of such owner or party in in-

terest, or if there be two or more, of either of them, in the county to which said execution is issued, on the day such judgment was docketed in said county, or on any day thereafter. But no such deficiency shall be collected out of any real property, unless such deiency* shall amount to or exceed the sum of twenty-five dollars.

§ 10. Every lien created under the provisions of this Act shall continue until the expiration of six months from the time of filing the notice prescribed in the second section of this Act, unless sooner discharged by the Court or some legal Act of the claimant in the proceedings; but if within such period of six months, proceedings are commenced to enforce or foreclose such lien, then such lien shall continue until judgment shall be rendered thereon, and for one year thereafter such lien shall also continue during the pendency of an appeal and for one year after the determination thereof. When a judgment is rendered as aforesaid, it may be docketed in any county of this State and enforced as if obtained in an action in a court of record.

§ 11. Appeals from judgments rendered pursuant to this Act may be taken by either party in the same manner, within the same time, and subject to the same rules and course of procedure as in appeals taken in civil actions arising on contract, and with like costs and disbursements, and the judgment thereon shall be enforced as judgments on appeal are now enforced and collected. Such appeal shall be had and taken only in the proceeding or action wherein judgment shall be given or rendered, but such appeal shall not operate as a stay of

* So in original.

proceedings or in any manner to affect the foreclosure or action of any other claimant or claimants then pending.

§ 12. The liens created by virtue of the provisions of this Act shall be paid and settled according to priority of notice filed with the County Clerk as directed by the second section of this Act.

§ 13. All liens created by this Act may be discharged as follows: First, by filing with the County Clerk a certificate of the claimant or his successor in interest, acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged; second, by depositing with the justice before whom, or the clerk of the court in which proceedings shall be commenced to enforce or foreclose said lien, a sum of money equal to double the amount claimed, which money shall thereupon be held subject to the determination of such proceedings; or, third, by an entry of the County Clerk made in the book of liens that the proceedings on the part of the claimant have been dimissed by the court or a judgment rendered against the said claimant.

AMENDMENT OF 1881.

LAWS OF 1881.—CHAP. 429.

AN ACT *to amend Chapter three hundred and fifteen of the Laws of eighteen hundred and seventy-eight, entitled "An Act to secure the payment of Laborers, Mechanics, Merchants, Traders and persons furnishing materials towards the performing of any public work in the cities of the State of New York."*

PASSED May 28, 1881; three-fifths being present.

SECTION 1. Chapter three hundred and fifteen of the Laws of eighteen hundred and seventy-eight, entitled an "Act to secure the payment of Laborers, Mechanics, Merchants, Traders and persons furnishing materials towards the performing of any public work in the cities of the State of New York," is hereby amended by adding thereto the following section, to be numbered section sixteen, and to read as follows:

§ 16. This Act shall apply to and include all cases and contracts under which work and materials have heretofore been, or shall hereafter be done and furnished upon any land, the title of which was, at the time of the making of the contract, and now is in any city, and for the performance of which appropriations have been, or shall hereafter be made and raised by any city; and shall apply to and include actions now pending for work done and materials furnished under any such contract.

§ 2. This Act shall take effect immediately.

APPENDIX.

CHAPTER I.—The Claimant.

Page 19, § 4, †.—A person furnishing materials to the sub-contractor is not allowed a lien under the Act of 1844, which only contractors and sub-contractors. Fowler *v.* Buffalo, &c., R. R. Co., 1 Sheldon, 525.

Page 20. § 5, ‡.—Watrous *v.* Elmendorf, 55 How., 461; Lanier *v.* Bell, 81 N. C., 337; Hill *v.* Braden, 54 Ind., 72; Same *v.* Ryan, id., 118; Talbot *v.* Goddard, 55 id., 496.

Page 21, § 7, *.—Rollins *v.* Cross, 45 N. Y., 766; Hooper *v.* Sells, 589 *a*, 127; Merchant *v.* Ottomwa, &c., 54 Iowa, 457.

Page 21, § 7, **.—In Jones *v.* Hurst (67 Mo., 568), the Court upheld a similar lien filed in the name of the firm by the partner who had previously acquired sole title to the claim.

Page 23, § 10, ‡.—Watrous *v.* Elmendorf, 55 How., 461.

Page 24, § 11.—When the work is performed under a contract with one tenant in common on his personal account, no lien can be enforced against the co-tenants, although they knowingly permitted the improvements and shared in the benefits thereof. Mellor *v.* Valentine. 3 Col., 255.

CHAPTER II.—The Owner.

Page 26, § 14.—A mechanic's lien will bind the property of a corporation where the contract is made in its name, although the stock is all hypothecated to the person named as owner in the notice of claim. Watrous *v.* Col. Bridge Co., 13 S. C., 433.

Page 27, § 16.—As to circumstances under which both legal and equitable title can be held, see Lewis *v.* Rose, 82 Ill., 574.

Page 28, § 17, †.—Dugan *v.* Brophy, 55 How., 121; Burbridge *v.* Marcy, 54 id., 466.

Page 28, § 17, ‡.—Craig *v.* Livingston, 8 Hun, 144; Conklin *v.* Bauer, 62 N. Y., 620.

Page 29, § 17, ¶.—A completion by the vendor does not give a right of lien to the sub-contractor of the vendee. Holley *v.* Van Dollen, 55 How., 333.

Page 30, § 18.—Hacket *v.* Badeau, 63 N. Y., 476; Riley *v.* Watson, 3 Hun, 568. This clause does not change the actual relation between the vendor and vendee *inter se.* Schuyler *v.* Hayward, 67 N. Y., 252.

Page 31, § 19.—Rollins *v.* Cross, 45 N. Y., 768; McGraw *v.* Godfrey.

Page 31, § 19, *.—Under the Cities Act of 1880 (§ 3), the vendor to the extent of future advances, as well as the vendee, is chargeable as owner.

Page 32, § 20, †.—But the mortgagor cannot bind the estate under a lien for work contracted after the decree of foreclosure and sale. Davis *v.* Conn. L. Ins. Co., 84 Ill., 508.

Page 34, § 23,*.—Johnson *v.* Wanstock, 31 La. An., 698.

Page 36, § 26, ‖.—Nor can he subject it to a lien for extensive improvements without specific authority therefor in the instrument creating the trust. Herbert *v.* Herbert, 57 How., 333; New *v.* Nichols, 12 Hun, 431 (affirmed in Court of App.). And see Perry on Trusts, 526; Austin *v.* Munroe, 47 N. Y., 360.

Page 37, § 26, ‡.—Noyes *v.* Blakeman, 6 N. Y., 567.

Page 38, § 27,*.—Brown *v.* Zeiss (Com. Pl. Gen. T., 1880), 10 Weekly Dig., 50; Myers *v.* Bennett, 7 Daly, 471; *sed contra,* Maryatt *v.* Riley, 2 Abb. N. C., 119..

Page 38, § 28, †.—Price *v.* Jennings, 62 Ind., 111.

Page 40, § 31, †.—Taylor *v.* Gilsdorff, 74 Ill., 354.

Page 40, § 32, ‡.—Garnett *v.* Berry, 3 Mo. App., 197; Cameron *v.* McCullough, 11 R. I., 173; Gilman *v.* Disbrow, 45 Conn., 563. But see Husted *v.* Mathes, 77 N. Y., 388.

Page 41, § 32, ‡.—It has been held that mere acquiescence implied the "consent" specified in several lien acts. See Husted *v.* Mathes, 77 N. Y., 388; Nellis *v.* Bellinger, 6 Hun, 560; Greenleaf *v.* Beebe, *sed contra,* Flannery *v.* Rohmayer, 4 Conn., 558; S. C. 33 Am. R., 36; Lauer *v.* Bandow, 43 Wis., 556; S. C. 28 Am. R., 571. But it is not sufficient evidence of a "contract." Jones *v.* Walker, 63 N. Y., 612. Although when a wife participates in the negotiations with her husband, knows the character of the contract, watches the progress of the work, and directs changes therein, his interest in the property may be held liable (Leisee *v.* Schwartz, 6 Mo. App., 413), if she permitted the work believing her husband was doing it on his own account (Gar-

nett *v.* Berry, 3 Mo. App., 197); or for cash (Price *v.* Leydell, 49 Iowa, 696); although she subsequently indorses the husband's note therefor. Hughes *v.* Anslyn, 7 Mo. App., 400.

Page 43, § 34, *.—The claimant in Pennsylvania is also required to state and prove that the work was necessary for the improvement or repair of the wife's separate estate. Kuhns *v.* Turney, 87 Pa. St., 497; Loomis *v.* Fry, 91 id., 276. In Indiana, however, the courts hold that she should have contracted with the view of charging her separate estate, as it is the law, not the contract that gives the right of lien. Although the statute relating to married women may require that such intention must exist in order to bind her separate property, the subsequent passage of a law covering the general subject will control and work a repeal by implication so far as applicable to work done on buildings. Shilling *v.* Templeton, 66 Ind., 535; Vail *v.* Meyer, 71 Ind., 157.

Page 46, § 39, §.—Dobschuetz *v.* Holliday, 82 Ill., 371.

Page 46, § 39.—See Wordyke *v.* Hawkeye Woolen Mills, 53 Iowa, 521.

Page 48, § 40.—Under the Kings and Queens Act, the "permission of the lessor" in such a case charges his estate with a lien. Burkill *v.* Harper, 79 N. Y., 273.

Page 49, § 41.—See on this point Dobschuetz *v.* Holliday, 82 Ill., 371.

Page 50, § 43.—Wilkinson *v.* Rust, 57 Ind., 172.

Page 50, § 43, §.—But see to the contrary, Barclay *v.* Mainright, 86 Pa. St., 191.

Page 51, § 43, *.—De Ronde against Olmstead, 47 How., 175; but see under the Kings County Act, Burkitt *v.* Harper, 79 N. Y., 273.

Page 51, § 44, †.—De Ronde *v.* Olmstead, 47 How., 175.

Page 52, § 44, *.—Under the State Act of 1873 it has been held that the grantee may be charged as owner to the extent of the work performed upon an entire contract subsequent to the purchase by him, on the ground of an implied contract to pay. (Tiley *v.* Thousand Is. Hot. Co., 9 Hun, 424.) This is in conflict with Myers *v.* Bennett, Loonie *v.* Hogan, and the drift of all the earlier cases in this State.

Page 52, § 45, †.—Although the fraudulent grantee is described in the notice of claim as the owner, the fraud may be shown at the trial for the purpose of defeating the transfer. Amidon *v.* Benjamin, 126 Mass., 276.

Page 53, § 46, †.—The assignment of the contractor does not prevent the filing of a lien by a sub-contractor. McMurray *v.* Hutcheson,

8 Abb. N. C., 423; Henderson *v.* Sturgis, 1 Daly, 336; Smith *v.* Baily, 8 id., 128; Manderville *v.* Reed, 13 Abb., 173.

Page 54, § 47.—So held at Special Term of the Common Pleas, in Brown *v.* Zeiss (Daily Reg., Feb. 13, 1880), but reversed at General Term. See 10 W. D., 50.

CHAPTER III.—The Contract.

Page 58, § 48.—The "Cities Act" of 1880 expressly states that the work or materials must be done or furnished "under or in pursuance or in conformity with a contract, agreement or employment by the owner;" thus making the pre-existence of a contract express or implied an absolute necessity.

Page 60, § 50.—The later decisions favor the claimant and raise the implication of an existing contract to pay for work enuring to the benefit of the alleged owner, from very slight circumstances of assent or permission. See note to page 63.

Page 63, § 53.—An implied contract in many instances arises from mere permission or acquiescence. See Wheeler *v.* Schofield, 6 Hun, 655; S. C. on App., 67 N. Y., 311; Tiley *v.* Thousand Island Hot. Co., 9 Hun, 424; Husted *v.* Mathes, 77 N. Y., 388. Nellis *v.* Bellinger, 6 Hun, 560; Burkitt *v.* Harper, 79 N. Y., 273. But no such presumption will arise when there is an express contract. See Crane *v.* Genin, 60 N. Y., 127.

Page 64, § 54, *.—In the case of materials, no lien will attach without they were sold expressly for the buildings in question. Watrous *v.* Elmendorf, 55 How., 461; Heaton *v.* Horr, 42 Iowa, 187; Crawford *v.* Crockett, 55 Ind., 220.

Page 66, § 55,*.—The "consent" of the owner contained in a lease of the premises that certain repairs might be done on the premises, will not charge his property by a lien therefor, if coupled with the express statement that he shall be at no expense on account thereof. Hervey *v.* Gay, 42 N. J. L., 168.

Page 67, § 55*a*, †.—Dowdney *v.* McCullum, 57 N. Y., 367.

Page 70, § 57, †.—Watrous *v.* Elmendorf, 55 How., 461.

Page 73, § 61, §.—This chain of liabilities must be continuous from owner to claimant. The default of an intervening sub-contractor is fatal to the lien. Crane *v.* Genin, 60 N. Y., 127; Lumbard *v.* Syracuse B. & N. Y. R. R. Co., 55 N. Y., 491.

Page 74, § 62, *.—Herbert *v.* Herbert, 57 How., 333.

Page 74, § 62, †.—And see Morehouse *v.* Moulding, 74 Ill., 322.

Page 75, § 63,*.—Heckman *v.* Pinckney, 81 N. Y., 211; see Schuyler *v.* Hayward, 67 id., 250; and Jenks *v.* Brown, 66 id., 629.

Page 76, § 64, †.—The later and better rule is that in the absence of bad faith a substantial performance is sufficient to allow a recovery on the contract, less deductions for defects and omissions. See Glacius *v.* Black, 50 N. Y., 145, 153, and S. C., 67 id., 567; Woodford *v.* Fuller, 80 id., 312; Heckman *v.* Pinkney, 81 id., 211; Flannery *v.* Rohrmayer, 46 Conn., 58.

Page 77, § 65, *.— Drake *v.* O'Donnell, 49 How., 25.

Page 77, § 65, ‡.—Morgan *v.* Stevens, 16 Abb. N. C., 363.

Page 78, § 66, §.—Redbourne *v.* S. L. Grape and Wine Co., 67 N. Y., (overruling S. C. 5 Hun, 12); Briggs *v.* Clapp, 74 Ill., 335. But see Wheeler *v.* Schofield, 67 N. Y., 311.

Page 78, § 66, ‖.—Murphy *v.* Buckman, 66 N. Y., 297; Hacket *v.* Badeau, 63 id., 476.

CHAPTER IV.—The Work and Materials.

Page 84, § 72, ‖.—38 Pa. St., 151; *sed contra*, Bernard *v.* McKenzie, 4 Col., 251.

Page 85, § 73, *.—Gaylord *v.* Loughbridge, 50 Tex., 573.

Page 85, § 74, ‡.—In 1875 it was extended to railroads (Laws of 1875, chap. 392); in 1878 to work done on public baildings (chap. 315); and in 1880 to oil wells (chap. 440).

Page 87, § 77, †.—The lien will not apply to a ship while being built in the yard. Stewart *v.* Pogoda, 3 Hugh, 459.

Page 89, § 78, *.—Goodin *v.* Elleardsville Hall Asso., 5 Mo. App., 289; Parish's Appeal, 83 Pa. St., 111; Schenk *v.* Uber, 81 id., 81; Ottumwa W. M. Co. *v.* Hawley, 44 Iowa, 57. It will extend to movable scenery for a theatre and the appliance for using the same. Greaves *v.* Alloway, 3 Tenn., ch. 536. Also for the chairs constructed and peculiarly adapted therefor. Id., and Grosz *v.* Jackson, 6 Daly, 463.

Page 90, § 80,*.—See Birm. Iron F. Co. *v.* Glen Cove Starch Co., 78 N. Y., 30; Stout *v.* Sawyer, 37 Mich., 313; Equitable Ins. Co. *v.* Slye, 45 Iowa, 615; Dobschuetz *v.* Holliday, 82 Ill., 371.

Page 90, § 80.—Goodin *v.* Elleardsville Hall Asso., Mo. App., 2 89.

Page 92, § 82.—Where a contract includes building foundation walls, and moving thereon a completed building, a lien can be enforced therefor. Chase *v.* James, 10 Hun, 506. But in Massachusetts the Courts decide that the mere removal of a building from one lot to another is not work performed "in the erection, alteration or repair of

any building or structure on real estate," and a lien cannot, under such a statute, be charged upon the lot to which it is removed for the value of such services, where the contract covers only such removal, and no other work was performed except raising the building a few inches to receive the under-pinning. Trask *v.* Searle, 121 Mass., 229.

Page 93, § 82.—The "Cities Act" of 1880 covers all work and materials used "toward the erection, altering or repairing of any house, vault, wharf, fence or any other structure," or in grading, filling-in, excavating or laying walks on any lots of land," etc.

Page 94, § 83 ¶.—Such a lien has now been fully established in this State. Moran *v.* Chase, 52 N. Y., 346.

Page 95, § 84, †.—Hastings *v.* Wood, 2 Mo. App., 148; Board of Education *v.* Neidenburger, 78 Ill., 58; Quinn *v.* Allen, 85 id., 39; Thomas *v.* Industrial Univer'y, 71 id., 310; Charnock *v.* Dist. Town of Colfax, 51 Iowa, 70; S. C., 33 Am. R. 116; *sed contra*, McKnight *v.* Parish of Grant, 31 Am. R., 226.

Page 95, § 84, §.—Boughton *v.* Board of Supervisors, etc., 84 Ill., 384; Whiting *v.* Story County, 54 Iowa, 81. Nor upon a fire-bell tower. Leonard *v.* Reynolds, 7 Hun, 73.

Page 96, § 84, †.—But a lien may be filed against a church. Jones *v.* Mount Zion Cong., 30 La. An., Part I, 711.

Page 96, § 84.—Section 10 of the "Cities Act" of 1880 contains a similar provision, and Chap. 315 Laws of 1878 provides for liens against the amount due the contractor on public buildings.

Page 96, § 85.—Loring *v.* Small, 60 Iowa, 271.

Page 97, § 85, *.—The statutory lien has been extended to bridge and trestle works for railroads (Laws of 1870, chap. 529), *infra post*, and to wharves, piers, bulkheads and bridges (Laws of 1872, chap. 669); but this will not cover public bridges; *infra post.*

Page 98, § 86.—Kentucky Lead, etc., Co. *v.* New Albany Water Works, 62 Ind., 63, *infra post.*

Page 98, § 86*a*. **Homesteads.**—Where real estate has assumed such a position as to be strictly classed as a homestead, it is protected by public policy even against claims for its repair or improvement, and cannot therefore be subject to a mechanics' lien. (Cogel *v.* Mickow, 11 Minn., 475; Coleman v. Ballandi, 22 id., 144; Merchant v. Perez, 11 Tex., 20). This right may be waived, and waiver may be shown by acts as well as by express statement. Clapp *v.* Thomas, 5 Allen (Mass)., 158. But the mere purchase of building material for use thereon is not in itself a waiver. Neither will such material be deemed a part of the purchase money. Cogel *v.* Mickow, *supra.* The

right of homestead is, however, a personal one, and intended to preserve the property solely as the *home* of the owner. And the privilege will not exist except when it is in his possession. Baker *v.* Brintnall, 52 Barb., 188; Kuster *v.* McWilliams, 41 Ala. N. S., 302.

Page 100, § 87.—A lien law applicable to public buildings has since been established on this theory. Laws of 1878, chap. 315.

Page 103, § 90, ‖.—And in Iowa, Neilson *v.* Iowa Eastern R. R. Co, 51 Iowa, 184.

Page 107, § 93, ‖.—Also in California, Barrows *v.* Knight, 55 Cal., 155; and Mass., Gale *v.* Blaikie, 129 Mass., 200.

CHAPTER V.—The Property Chargeable.

Page 113, § 95, *.—Under a lien law which extends the privilege to the "lot or tract" of land upon which the building is erected, the entire U. S. Survey of 400 acres may be charged by a lien for work done in constructing necessary dwelling and outhouses thereon. St. Louis Nat'l. St. Yard *v.* O'Reilly, 85 Ill., 546.

Page 114, § 97, *.—Repairs to a boiler situated in a small building adjoining a mill, to which it furnishes motive power, will, in case the boiler is so attached to the building as to be a fixture, give a right of lien upon both buildings and the appurtenances, and lot connected therewith. Kelly *v.* Border City Mills, 126 Mass., 148.

Page 115, § 99.—Where the statute specifies the house and *lot* upon which it is situated, the lien may be filed upon several adjoining city lots, forming a single plot inclosed by a fence. *Exp.* Davis, 9 S. C., 204.

Page 116, § 100, *.—Memholz *v.* Grodt, 4 Mo. App., 568.

Page 117, § 103, †—But the Court cannot apportion separate liens, or the order of sale thereunder, so that one block or lot shall be sold for work done upon another. Bayard *v.* McGraw, 1 Ill. App., 134.

Page 118, § 104, *.—Hall *v.* Sheehan, 69 N. Y., 618; Moran *v.* Chase, 52 id., 346; Peck *v.* Standard, 1 Ill. App., 228; McKelleget *v.* Eckhard, 4 Mo. App., 589.

Page 119, § 105.—Hill *v.* Braden, 54 Ind., 72.

CHAPTER VI.—Payment.

Page 125, § 112, *.—Dun *v.* Rankin, 27 Ohio, St., 132; Culver *v.* Elwell, 73 Ill., 536.

Page 126, § 112, †.—See Section 127*a*.

Page 126, § 112, ‡.—In Nevada the owner is held strictly to his pay-

ments according to the contract. Hunter *v.* Tourckee Lodge, 14 Nev., 25; Lonkey *v.* Cook, 15 id., 58; and see Section 127*a*.

Page 127, § 113, †.—Merrit *v.* Pearson, 58 Ind., 385.

Page 128, § 115,*.—When the debtor by the creditor's consent has applied a payment so as to liquidate the amount due for materials sold to one building, he cannot afterwards, to the prejudice of the owner thereof, change the application to other buildings. Chicago Lumber Co. *v.* Woods, 53 Iowa, 552.

Page 136, § 123, ‖.—Day *v.* Anderson, 39 N. J. L., 199.

CHAPTER VII.—Set-off and Counter Claim.

Page 143, § 129.—See Cheney *v.* Troy Hospital Association, 65 N. Y., 282.

CHAPTER VIII.—Waiver.

Page 150, § 135, †.—A covenant against liens will not be broken, nor will the right of lien be waived if the owner's default in payment preceded and caused the filing thereof. Eberly *v.* Curtis, 5 Mo. App., 595.

Page 152, § 138.—Receiving a conveyance of real estate as part payment on a building contract does not create a waiver as to the balance due thereon. Bayard *v.* McGraw, 1 Ill. App., 134.

Page 153, § 139, *.—And it has been held that the taking of a mortgage, though invalid in form, waives the right of lien. Taylor *v.* B. & C. R. R. Co., 4 Dillon, 570–9. So will a mortgage executed at the same time the lien is filed. Trullinger *v.* Kofred, 7 Ohio, 228; and see § 139*a*. But in this State the Supreme Court holds, that the mechanic is entitled to all the securities he can get; and neither the acceptance of a mortgage nor the recovery of a deficiency judgment thereon amounts to a waiver. Hall *v.* Pettigrove, 10 Hun, 609.

Page 154, § 139*a*, ‡.—Gardner *v.* Hall, 29 Ill., 277; Gonnan *v.* Sagner, 22 Mo., 127; Burroughs *v.* Bangman, 9 Mich., 213.

Page 155, § 139.—But a sub-contractor will not lose his right of lien by taking an accepted order of the contractor upon the owner without he expressly receives it as a payment. Meeks *v.* Simms, 84 Ill., 422. Nor where one member of his firm accepts a trust deed upon the property in question, and additional lots as a security for that and other claims. Parberry *v.* Johnson, 51 Miss., 291.

Page 156, § 140, †.—But held to be a waiver where no demand, nor inability to furnish the mortgage was proven. Weaver *v.* Demuth, 40 N. J. L., 238. And see Dowdney *v.* McCullum, 59 N. Y., 367.

Page 158, § 142, †.—But the decree will not be granted until the old note is surrendered or cancelled. Bayard *v.* McGraw, 1 Ill. App., 134.

Page 160, § 144, *.—Ehlers *v.* Elder, 51 Miss., 495. It is held in New Jersey that the right to file a lien is *suspended* until the maturity of a note covering the amount of the claim. Day *v.* Anderson, 39 N. J. L., 199.

Page 161, § 145, §.—A waiver arises in favor of the owner where the identity of the lien claim is merged in a general indebtedness by the claimant's acceptance of a note including that with other claims due him by the contractor. Scherlenberg *v.* Robison, 5 Mo. App., 561. Or whenever the laborer has so mixed his claim on the property with non-lien items that the exact amount for which he is entitled to a lien cannot be ascertained. Baker *v.* Fessenden, 71 Me., 292 ; McMaster *v.* Merrick, 41 Mich., 505.

CHAPTER IX.—Merger.

Page 164, § 147, *.—Where a claimant takes a deed to the property covered by the lien, with the intention that it should not be merged thereby, such intention will prevail as to junior incumbrancers. Delaware R. R. Construction Co. *v.* Davenport & St. Paul R. R. Co., 46 Iowa, 406.

CHAPTER X.—Special Defenses.

Page 174, § 160.—It was raised, and the Pennsylvania rule followed, in Schuckraft *v.* Ruck (6 Daly, 1), in which the General Term of the Common Pleas held that no lien—even on the lot—can be acquired for work done upon a building that has been blown down and totally destroyed.

Page 179, § 165.—See to that effect Harrington *v.* Dolman, 64 Ind., 255.

Page 180, § 165, *.—Neither will the addition of the words "with interest," affect it. It will be simply treated as surplusage. McMillan *v.* Seneca Lake Gr. & Wine Co., 6 Hun (Reversed, but on other grounds, in the Court of App., 67 N. Y., 215).

Where the excess is very great the Court will presume it to have been intentional, and vacate the lien for fraud. Kling *v.* Railway Construction Co., 7 Mo. App., 400. And this is specially true where the lien is filed by a sub-contractor. Reeve *v.* Elmendorf, 38 N. J. L., 125.

CHAPTER XI.—The Notice of Lien.

Page 192, § 193, *.—The "Cities Act" of 1880, applicable to all the cities except Buffalo, is plain in its terms. Under it the lien may be filed within 30 days from the completion of the *original* contract, without regard to the time when the claimant performed his sub-divided portion thereof.

Page 193, §. 175, *.—Where materials are filed upon two houses, under such circumstances that a separate lien could be filed against each, the time commences to run as to each house from the day of the last delivery thereon. Hudnit *v.* Roberts, 10 Phila., 535.

Page 194, § 175, †.—Watts *v.* Whittington, 48 Md., 353.

Page 194, § 176, ‖.—This case was followed under a similar presentation of facts in Hubbell *v.* Schreyer, 4 Daly, 362.

Page 196, § 177, †.—So held until the New York City Act of 1863, in Haden *v.* Buddensick, 6 Daly, 3; S. C., 49 How., 241, and this undoubtedly is the prevailing rule in this State, (see Chase *v.* James, 10 Hun, 506); except where, as in the "State Act" of 1873, the time commences to run from the "final furnishing" of the materials. Tiley *v.* Thousand Island Hotel Co., 9 Hun, 424.

Page 198, § 178.—The decisions in this State can be harmonized on the principle stated in the note to section 176. The new "Cities Act" will follow the rule of Haden *v.* Buddensick, and Chase *v.* James, rather than the "Tiley" case.

Page 198, § 179, *.—Where the work, though done under two separate contracts, is in fact continuous, the time commences to run on the final completion, and covers the entire work. Capron *v.* Stout, 11 Nev. 304. But if there is no continuity in fact or by contract, they can not be so bound together for the purposes of this proceeding as to prevent the time from running against each separate contract, order or performance. Baker *v.* Fessenden, 71 Me., 292.

Page 202, § 182, ‖.—But a valid lien may be subsequently filed. Hallahan *v.* Herbert, 57 N. Y., 409.

Page 203, § 183, *.—Diossy *v.* Martin, Daily Reg., 187; Farley *v.* Heinburgh, Com. Pleas Gen. T., Apr. 1, 1878; Dugan *v.* Brophy, 55 How., 121.

Page 204, § 185, ‡.—A failure to state the clause "After deducting all just credits and offsets," under the Act of 1875, has been held fatal. Farley *v.* Heinburgh, C. P. Gen. T., Apr. 1878. But see to the contrary Smith *v.* Baily, 8 Daly, 128, and Fogarty *v.* Wick, id., 166; where a substantial observance is held sufficient.

Page 205, § 181, ‖.—Brown *v.* Welch, 5 Hun, 582. Where it ap-

pears that the claim is filed by the contractor, a statement of the ownership, without specifically naming the contractor, is sufficient. Riley *v.* Watson, 3 Hun, 562; Moran *v.* Chase, 522 N. Y., 346; and see Burroughs *v.* Fosteran, 2 Abb. N. C., 333."

Page 206, § 188, †.—The claimant is not estopped by the statements in his note of claim, but may explain them on the trial. Thus where a lien filed Feb. 7, specified the completion of the work on Dec. 9, which if correct would have rendered the lien void, as not being within the statutory limit of 40 days, the Court held that he might show on the trial that Dec. 9 was written by mistake for Dec. 17. Westland *v.* Goodman, 47 Conn., 83; Cole *v.* Uhl, 46 id., 296. Where "terms, time given, and conditions of contracts are required," it is not sufficient to state the sale to be for "cash." Hooper *v.* Flood, 54 Cal., 218. And in Texas, though not a statutory requirement, the Court held that the lien, when founded on a verbal contract, should state "the character and amount of the materials furnished, and the work performed, the dates and places where thus furnished, and the value of the same," that there should be a full bill of particulars specifying this. Ferguson *v.* Ashbell, 53 Tex., 245. It is not necessary to state whether the claimant's contract is in writing. Fogarty *v.* Wick, 8 Daly, 166. But it must state *all* the work claimed. Claiming for painting the house only where the contract included the "fence around the lot," has been held a fatal defect. Jones *v.* Walker, 1 Sheldon, 350; S. C. affir'd on other grounds in 63 N. Y., 612. In Minnesota, where a strict construction of the statute prevails, the Courts hold that a notice must show that the person named in the lien as owner, was the contracting owner—*i. e.*; it must show some connection between him and the person contracting with the claimant for the work in question. Clark *v.* Schatz, 24 Minn., 300.

Page 207, § 190, †.—Neither is "John," within a line drawn over the "ohn," where the owner's name was "James." Getchell *v.* Moran, 124 Mass., 404.

Page 208, § 191. *.—Under the New York City Act of 1875, the giving of the wrong name as the owner has been held fatal. McElwee *v.* Sanford, 53 How., 89; but the "Cities Act" of 1880 makes this variance immaterial; and in Connecticut this has, in the absence of such a provision, been held an immaterial variance. Shattuck *v.* Beardsley, 46 Conn., 296.

Page 210, § 193, **.—McLean *v.* Young, 2 MacArthur, 184.

Page 211, § 194, †.—Mechanics Planing Mill Co. *v.* Nast, 7 Mo. App., 147.

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